Supreme Court, U.S.
FILED
951567 MAR 26 1996
OFFICE OF THE CLERK

No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF INDIANA,
Petitioner,
v.
ROSS BRYANT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

---

PETITION FOR WRIT OF CERTIORARI

PAMELA CARTER
Attorney General of Indiana

GEOFFREY SLAUGHTER*
DAVID ARTHUR
GEOFF DAVIS
Deputy Attorneys General

219 State House
Indianapolis, Indiana 46204
(317) 232-6255

*Counsel of Record

QUESTIONS PRESENTED

1. Does the mere administrative assessment of Indiana's drug excise tax, which becomes payable upon the manufacture, possession or delivery of a controlled substance, constitute a first jeopardy that precludes a later prosecution for the underlying offense?

2. Is Indiana's drug excise tax even a punishment that implicates the Double Jeopardy Clause?

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court below are named in the caption.

Petitioner, State of Indiana, was the only appellee in the Indiana Supreme Court and the only plaintiff in the state trial court. Respondent, Ross Bryant, was the only appellant in the Indiana Supreme Court and the only defendant in the state trial court.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement 2

Reasons for Granting the Writ 7

I. The Decision That The Mere Assessment Of A Drug Excise Tax Is A Jeopardy Foreclosing Criminal Prosecution Conflicts With The Decisions Of Every Other Court That Has Addressed When Jeopardy Attaches In A Civil Proceeding 8

II. The Indiana Supreme Court's Erroneous Decision On An Important Question Of Federal Law Conflicts With Recent Decisions Of Other State Courts Holding That Drug Excise Taxes Due Upon The Commission Of A Crime Do Not Implicate Double Jeopardy 11

Conclusion 15

Appendix

TABLE OF AUTHORITIES

Cases

American Trucking Assoc. v. State, 512 N.E.2d 920 (Ind. Tax 1987) 3

Bryant v. State, 660 N.E.2d 290 (Ind. 1995) ..... *passim*

Coulbern v. State, 655 N.E.2d 1254 (Ind.App. 1995) 14

Covelli v. Commissioner of Revenue Services, 668 A.2d 699 (Conn. 1995) 12, 14

Desimone v. State, 904 P.2d 1 (Nev. 1995), *petition for cert. filed*, 64 U.S.L.W. 3469 (Jan. 2, 1996) (No. 95-1058) 9, 11

Marchetti v. United States, 390 U.S. 39 (1968) 14

Milner v. State, 658 So.2d 500 (Ala. Civ. App. 1994), *state cert. denied*, (Ala. Mar. 3, 1995). 13

Minor v. United States, 396 U.S. 87 (1969) 14

Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) ..... *passim*

National Private Trucking Assoc. v. Indiana Dep't of State Revenue, 512 N .E.2d 929 (Ind. Tax 1987) 3

State v. Gulledge, 896 P.2d 378 (Kan. 1995) 12

State v. Lange, 531 N.W.2d 108 (Iowa 1995) 12

State v. Litchfield, 902 P.2d 921 (Colo. App. 1995), *state cert. granted*, (Colo. Sept. 11, 1995) 9

Stennett v. State, 905 S.W.2d 612 (Tex.App.1995), *state review granted*, (Tex. Oct. 11, 1995) 11

United States v. Baird, 63 F.3d 1213 (3rd Cir. 1995) 9

United States v. Barton, 46 F.3d 51 (9th Cir. 1995) 10

United States v. Halper, 490 U.S. 435 (1989) 7

United States v. Idowu, 74 F.3d 387 (2d Cir. 1996) 10

United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 930 (1996) 10

United States v. Park, 947 F.2d 130 (5th Cir. 1991) 9

United States v. Sanchez, 340 U.S. 42 (1950) 13

United States v. Torres, 28 F.3d 1463 (7th Cir.) 10

United States v. Ursery, 59 F.3d 568 (6th Cir. 1995) 9

Ward v. State, 1996 WL 37978 (Tex. App. Jan. 29, 1996), *state review filed*, (Tex. Mar. 15, 1996) 11

Constitutional Provisions

U.S. Const. amend. V 2, 5
U.S. Const. amend. XIV 2

Rule

U.S. SUP. CT. R. 10(b) 15

Statutes

28 U.S.C. § 1257(a) 1
IND. CODE § 6-7-3-1 ..... 2, 5
IND. CODE § 6-7-3-5 2
IND. CODE § 6-7-3-6(a) 2
IND. CODE § 6-7-3-6(a)(1) 5
IND. CODE § 6-7-3-8 ..... 2, 13, 14
IND. CODE § 6-7-3-9 14
IND. CODE § 6-7-3-10(b) 2
IND. CODE § 6-7-3-11(a) 2
IND. CODE § 6-7-3-11(a) 2, 5
IND. CODE § 6-7-3-13 3
IND. CODE § 6-8.1-10-4 2
IND. CODE § 6-8.1-5-1 ..... 2, 3
IND. CODE § 6-8.1-5-1(c) 3
IND. CODE § 6-8.1-5-1(e) 3
IND. CODE § 6-8.1-5-1(g) 3

IND. CODE § 6-8.1-5-1(h) 3
IND. CODE § 6-8.1-5-3 3
IND. CODE § 6-8.1-9-1 3
IND. CODE § 6-8.1-9-1(d) 3
IND. CODE § 35-48-4-11 2
IND. CODE § 35-48-4-11(1) 5
IND. CODE § 35-48-4-11(2) 5
IND. CODE § 35-48-4-13 ..... 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF INDIANA,
Petitioner,
v.
ROSS BRYANT,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The State of Indiana respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Indiana.

OPINION BELOW

The decision of the Indiana Supreme Court sought to be reviewed is published as *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), and is reproduced in the Appendix beginning at A-1.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on December 27, 1995. Rehearing was not sought. This Court has jurisdiction to review final judgments of state courts pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution are the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. App. A-42. Relevant statutory provisions include the Controlled Substances Excise Tax, IND. CODE §§ 6-7-3-1 *et seq.*; App. A-43; the Tax Assessment Statute, IND. CODE § 6-8.1-5-1; App. A-48; and the underlying criminal offenses with which Respondent was charged. IND. CODE §§ 35-48-4-11 and 35-48-4-13. App. A-51, 52. The full text of these provisions is reproduced in the Appendix.

STATEMENT

1. A person incurs a tax liability under Indiana's Controlled Substances Excise Tax ("CSET") when he manufactures, possesses or delivers a controlled substance in violation of state or federal drug laws. IND. CODE § 6-7-3-5. App. A-43. The tax rate varies from $10 to $40 per gram, depending upon the substance. IND. CODE § 6-7-3-6(a). App. A-43. The tax may be paid anonymously in advance, IND. CODE §§ 6-7-3-8, and proof of payment is valid for 48 hours. IND. CODE § 6-7-3-10(b). App. A-44, 45. Failure to pay the tax prior to manufacturing, possessing or delivering a controlled substance subjects the person to a penalty equal to the amount of the tax. IND. CODE § 6-7-3-11(a). App. A-45. This 100% penalty is the same penalty applicable to any taxpayer who fraudulently fails to file a return or to pay a tax when due. IND. CODE § 6-8.1-10-4.[1]

---

[1] Certain of these statutes have been amended effective July 1, 1996, to reduce the tax rate relating to marijuana and to increase to 30 days the length of time for which the proof of payment of the CSET is valid. Those amendments do not affect this case.

By statute, the Department of Revenue can issue an assessment to assure the tax is paid. IND. CODE §§ 6-7-3-13 and 6-8.1-5-3. App. A-45 -46. For example, an assessment may be issued when the Department finds circumstances "that would jeopardize the collection of those taxes," meaning that collection of the tax is uncertain and may be in jeopardy. IND. CODE § 6-8.1-5-3.

After issuance of the assessment, the taxpayer has 60 days to file a written protest of the assessment. IND. CODE § 6-8.1-5-1(c). App. A-48. If a protest is filed, the Department must hold a hearing on the protest and issue a letter of findings within 60 days of the hearing. IND. CODE § 6-8.1-5-1(e). App. A-49. Respondent pursued none of these administrative remedies.

If a protest is rejected administratively, the taxpayer may file an original tax appeal in the Indiana Tax Court, IND. CODE § 6-8.1-5-1(g), which hears the case *de novo* and without a jury. IND. CODE § 6-8.1-5-1(h), App. A-49. The Tax Court may enjoin collection of the tax pending final decision, IND. CODE § 6-8.1-5-1, App. A-49, even before administrative proceedings have concluded. *American Trucking Assoc. v. State*, 512 N.E.2d 920 (Ind. Tax 1987); *National Private Trucking Assoc. v. Indiana Dep't of State Revenue*, 512 N.E.2d 929 (Ind. Tax 1987).

If the taxpayer elects to pay the tax, he may file a claim for refund with the Department within three years of payment, may receive an administrative hearing on the claim and may appeal to the Tax Court from an adverse administrative determination. IND. CODE § 6-8.1-9-1. Such appeal in the Tax Court is also *de novo* and without a jury. IND. CODE § 6-8.1-9-1(d).

2. In August 1992, a deputy sheriff in Grant County, Indiana, responded to a security alarm at Respondent's home. App. A-1. The officer checked the perimeter of the house for signs of entry and noticed the back door was open and had fresh pry marks. App. A-1, 19. He opened the unlocked screen door and yelled inside but no one responded. (R. 139.) Concerned that someone, perhaps an intruder, might still be inside, the officer called for backup. (R. 140, 146, 148.)

When another officer arrived, the two went inside and conducted a protective sweep of the residence, searching for an intruder only in places where a person could be hiding. App. A-2, 19. Peering into the basement, one of the officers saw in plain view what he believed to be marijuana plants. App. A-19. The other officer also suspected marijuana because of the smell. (R. 173.)

An officer with the local narcotics task force obtained a warrant to search the entire house and to seize specified drug-related contraband found there. App. A-2, 19. Among the items uncovered in the search were more than 250 marijuana plants, marijuana seeds, bags of dried marijuana and a pipe with marijuana residue (R. 305.) App. A-2. The basement was equipped with a sophisticated growing system, including specialized lighting and ventilation. (R. 197.)

Respondent returned home while this search was on-going. (R. 200.) After trying unsuccessfully to call his attorney, Respondent told police that the marijuana was his and that he was growing it for his own use. (R. 208.) Police arrested Respondent and transported him and the seized objects to the Grant County Jail. App. A-2.

3. Police next contacted the Indiana Department of Revenue, which dispatched a special agent to the jail to

determine the amount of CSET that Respondent owed. App. A-2; *see* IND. CODE § 6-7-3-1 *et seq.*, App. A-43. The seized marijuana weighed 2092 grams. Based on a statutory tax rate of $40 per gram of marijuana, the agent assessed a tax of $83,680. App. A-2; *see* IND. CODE § 6-7-3-6(a)(1), App. A-43. He then met with Respondent and demanded payment. Because Respondent did not pay the tax immediately, the agent served him with an assessment notice requiring payment of the CSET plus a 100% penalty for failing to pay the tax before possessing the marijuana. App. A-2; *see* IND. CODE § 6-7-3-11(a), App. A-45. The Department also seized Respondent's home and levied on other of his assets to secure payment on the tax obligation. App. A-3.

4. The State brought four criminal counts against Respondent, charging him with growing and cultivating more than 30 grams of marijuana, a class D felony, IND. CODE § 35-48-4-11(2), App. A-51; maintaining a common nuisance, a class D felony, IND. CODE § 35-48-4-13, App. A-52; possessing less than 30 grams of marijuana, a class A misdemeanor, IND. CODE § 35-48-4-11(1), App. A-51; and failing to pay the CSET, a class D felony, IND. CODE § 6-7-3-11(b). App. A-3, 45.

In October 1992, Respondent moved to dismiss the CSET count, arguing that the tax violates the Fifth Amendment to the federal Constitution. (R. 20-21.) The trial court denied this motion in January 1993. (R. 34.) A jury convicted Respondent of all four counts in April 1993. App. A-3. Following trial, Respondent moved to vacate the conviction for failure to pay the CSET, arguing violation of the Double Jeopardy Clause. (R. 109.) The trial court denied this motion. (R. 114.) In June 1993, the trial court sentenced Respondent to two and a half years in prison on each felony count and to one year for misdemeanor possession. The

sentences were to run concurrently, with one year suspended followed by one year probation. App. A-3.

In July 1993, Respondent appealed to the Indiana Court of Appeals, arguing among other things that the State violated double jeopardy by assessing both CSET's civil and criminal sanctions against him. Briefing in the state appellate court was completed in April 1994. Subsequently, in June 1994, this Court decided *Montana Dep't of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994). In July 1994, the State filed a supplemental brief discussing the application of *Kurth Ranch* to this case. Before the court of appeals issued a decision, the Indiana Supreme Court transferred this case to its own docket in September 1994. App. A-4.

On appeal, a divided Indiana Supreme Court affirmed Respondent's nuisance conviction but vacated his remaining convictions: failing to pay the CSET, growing marijuana and misdemeanor possession. *Bryant v. State*, 660 N.E.2d 290, 303 (Ind. 1995). App. A-23. By a 3-2 vote, the court held that the CSET was a "punishment," App. A-6 -10, and that its assessment against Respondent was a jeopardy, App. A-12 -16, on the purported authority of this Court's double jeopardy jurisprudence. It concluded that Respondent's criminal prosecution for failing to pay the CSET thus was a second jeopardy in violation of the Double Jeopardy Clause, as were his criminal prosecutions for growing and possessing marijuana. App. A-16.

Two Justices dissented from the majority's holding that a tax assessment can constitute a *first* punishment, thus barring a subsequent criminal prosecution. Justice Sullivan observed that this Court in *Kurth Ranch* expressly noted it was not faced with "the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in nature."

Bryant, 660 N.E.2d at 304 (quoting *Kurth Ranch*, 114 S. Ct. at 1947 n.21). App. A-25. Agreeing with Justice DeBruler, Justice Sullivan thought it "highly inadvisable" to interdict the power of the state to prosecute criminal behavior "[i]n the absence of clear mandate from" this Court. *Bryant*, 660 N.E.2d at 304, 309-310. App. A-26, 41.

REASONS FOR GRANTING THE WRIT

The decision of the Indiana Supreme Court, in conflict with the decisions of several other state and federal appellate courts, imposes stringent new constitutional constraints on the method by which Indiana fights the war on drugs. The holding that Indiana's tax on the manufacture, possession and delivery of controlled substances is a punishment to which jeopardy attaches upon the mere administrative assessment of the tax was purportedly premised upon this Court's recent double jeopardy jurisprudence. *Kurth Ranch*, 114 S. Ct. 1937; *United States v. Halper*, 490 U.S. 435 (1989). Yet the legal standards declared by the Indiana Supreme Court, if allowed to stand, will extend the protection of the Double Jeopardy Clause further than this Court has ever required. Review by this Court is necessary to clarify the confusion among lower courts over the proper application of double jeopardy principles to the imposition of taxes and civil sanctions incident to drug crimes.

I. The Decision That The Mere Assessment Of A Drug Excise Tax Is A Jeopardy Foreclosing Criminal Prosecution Conflicts With The Decisions Of Every Other Court That Has Addressed When Jeopardy Attaches In A Civil Proceeding

The decision of the Indiana Supreme Court that jeopardy attaches when the state's department of revenue serves an assessment notice extends the Double Jeopardy Clause beyond the requirements set forth not only by this Court in *Kurth Ranch* but also by every other state and federal court that has considered when jeopardy attaches in tax or civil forfeiture proceedings.

A large number of states already have enacted drug taxes similar to Indiana's CSET.[2] In light of *Kurth Ranch*, many of these taxes may be deemed punishments that will preclude subsequent criminal prosecutions, as the decision below held concerning Indiana's tax. The question of when jeopardy attaches is a vital question which this Court has not addressed and on which the lower courts are in disarray.

---

[2] ALA. CODE 1 §§ 40-17A-1 to - 16 (Michie Supp. 1994); ARIZ. REV. STAT. ANN. §§ 42-1201 to -18 (West 1994); COLO. REV. STAT. ANN. §§ 39-28.7-101 to -9 (Bradford Supp. 1994); FLA. STAT. ANN. § 212.0505 (West Supp. 1995); GA. CODE ANN. §§ 48-15-1 to -11 (Harrison Supp. 1994); IDAHO CODE § 63-4201 to -11 (Michie Supp. 1994); ILL. ANN. STAT. ch. 35 ILCS 520/1 to -26 (Smith-Hurd 1995); KAN. STAT. ANN. §§ 79-5201 to -12 (1994); ME. REV. STAT. ANN. tit. 36 §§ 4433 to -6 (West 1994); MINN. STAT. ANN. §§ 297d.01 to .14 (West 1995); MONT. CODE ANN. §§ 15-25-101 -23 (1993); NEB. REV. STAT. §§ 77-4301 to -16 (1993); OKLA. STAT. ANN. tit. 68 §§ 450.1 to .9 (West Supp. 1994); R.I. GEN. LAWS §§ 44-49-1 to -15 (Michie Supp. 1994); TEX. TAX CODE §§ 159.001 to .301 (West Supp. 1995); UTAH CODE ANN. §§ 59-59-101 to -7 (Michie Supp. 1994); WIS. STAT. ANN. §§ 139.87 to .96 (West Supp. 1994); WYO. STAT. § 39-6-5-405 (a)(xix)(1994). *See Clifft v. Indiana Dep't of Revenue*, 660 N.E.2d 310, 314 n.2 (Ind. 1995) (compiling statutes).

Although there is no consensus, some state courts already have addressed this question and held that jeopardy attaches at some later point in the tax proceedings than assessment, such as when the assessed tax liability has been reduced to a judicial judgment, *Desimone v. State*, 904 P.2d 1 (Nev. 1995), *petition for cert. filed*, 64 U.S.L.W. 3469 (Jan. 2, 1996) (No. 95-1058), or when there has been a final administrative determination of liability. *State v. Litchfield*, 902 P.2d 921 (Colo. App. 1995), *state cert. granted*, (Colo. Sept. 11, 1995). Not only has there not been a final judgment of Respondent's tax liability, he has not even exhausted his administrative remedies.

Unsettled among the federal courts is the analogous question of when jeopardy attaches in a civil forfeiture proceeding. These courts uniformly reject the logic of the decision below and hold that administrative forfeiture is not a jeopardy; although, there is no agreement among the courts as to when jeopardy does attach. Some federal courts hold jeopardy attaches only when there is a final administrative action, an adjudication of administrative liability, or the entry of a final judgment of forfeiture. *See, e.g., United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995) ("Jeopardy attaches in a nontrial forfeiture proceeding when the court . . . enters the judgment of forfeiture"), *cert. granted*, 116 S. Ct. 762 (1996); *United States v. Park*, 947 F.2d 130, 135 (5th Cir. 1991) (no jeopardy until adjudication or final administrative action), *vacated in part on other grounds on rehearing in part*, 951 F.2d 634 (5th Cir. 1992).

Other federal courts hold that jeopardy might attach at some point *before* entry of final judgment, such as when the trier of fact begins to hear evidence at a judicial forfeiture proceeding. *United States v. Baird*, 63 F.3d 1213, 1218 (3rd Cir. 1995) (jeopardy occurs when defendant is "put to trial

before a trier of facts"), *cert. denied*, 116 S. Ct. 909 (1996); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.) (jeopardy attaches "when the case is first presented to the trier of fact"), *cert. denied*, 115 S.Ct. 669 (1994). And at least one court has suggested that jeopardy might attach as soon as the defendant "file[s] his answer to the forfeiture complaint." *United States v. Barton*, 46 F.3d 51, 52 (9th Cir. 1995).

Notwithstanding this conflict, there is one point of consensus among federal courts with which the decision below is at odds: jeopardy does not attach upon merely seizing the assets or filing a forfeiture complaint. "Nor do we consider the mere filing of an administrative claim sufficient to trigger jeopardy, at least where that act converts the proceeding to a judicial one with an opportunity for hearing." *United States v. McDermott*, 64 F.3d 1448, 1455 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 930 (1996). *Accord United States v. Idowu*, 74 F.3d 387, 396 (2d Cir. 1996) (suggesting jeopardy occurs no earlier than when trier of fact begins to hear evidence at judicial forfeiture proceeding or when there is an order for final administrative action against defendant's property).

Review is particularly appropriate in this case because the decision below threatens pending drug prosecutions in Indiana and may unravel past convictions obtained since the CSET's enactment in 1992.

II. The Indiana Supreme Court's Erroneous Decision On An Important Question Of Federal Law Conflicts With Recent Decisions Of Other State Courts Holding That Drug Excise Taxes Due Upon The Commission Of A Crime Do Not Implicate Double Jeopardy

The decision below warrants review not only because of its incorrect resolution of the important question of when jeopardy attaches, but also because its threshold holding that the CSET is a punishment under double jeopardy principles conflicts with recent decisions of other state appellate courts. Those courts correctly concluded under *Kurth Ranch* that taxes due immediately upon the manufacture, possession or delivery of drugs are not punishment at all.[3]

Several state appellate courts have addressed the double jeopardy implications of drug taxes in light of *Kurth Ranch* and reached conflicting results. The decision below aligns Indiana with Nevada and Texas in holding that drug taxes constitute punishment for double jeopardy purposes, even if payment of the tax is due promptly at the time of manufacture, possession or delivery of the drug. *See Desimone,* 904 P.2d 1; *Ward v. State*, 1996 WL 37978 (Tex. App. Jan. 29, 1996), *state review filed,* (Tex. Mar. 15, 1996); *Stennett v. State*, 905 S.W.2d 612 (Tex.App.1995), *state review granted,* (Tex. Oct. 11, 1995). In stark contrast are

[3] Perhaps the premise underlying *Kurth Ranch* -- that double jeopardy principles may apply to these self-assessed drug taxes -- should itself be re-examined, in light of the "hodgepodge of criteria" for evaluating whether a tax is a punishment, *Kurth Ranch*, 114 S. Ct. at 1949, and the difficult questions that arise, for example, when a person promptly and voluntarily pays the tax when due. Does jeopardy attach upon payment of the tax? What if only a portion of the assessment is paid? Is that portion still sufficient to constitute a jeopardy? Petitioner respectfully submits that so long as the tax has a non-penal purpose of raising revenue and deterring illegal conduct, it should be regarded as a legitimate tax for double jeopardy purposes.

recent decisions from Connecticut, Iowa, Kansas, and Alabama holding that similar drug taxes are *not* punishment under *Kurth Ranch*.

The Connecticut Supreme Court rejected the claim that the Double Jeopardy Clause prevents collection of its drug tax following a conviction for possession of the same drugs with intent to sell. *Covelli v. Commissioner of Revenue Services*, 668 A.2d 699 (Conn. 1995). The court reasoned that Connecticut's tax is not marked by the "idiosyncratic features" which led this Court in *Kurth Ranch* to find Montana's illicit drugs tax punitive. *Covelli*, 668 A.2d at 707. Unlike in Montana, reasoned the court, "the imposition of Connecticut's tax is not conditioned upon arrest and is intended to be assessed while the taxpayer is in actual possession of the drugs." *Id.*

Similarly, the Iowa Supreme Court found no double jeopardy problem with an assessment and subsequent prosecution because, unlike in *Kurth Ranch*, Iowa "imposes the tax on a dealer and makes the tax due and payable immediately upon the manufacture, production, acquisition, purchase or possession by the dealer," not after arrest. *State v. Lange*, 531 N.W.2d 108, 116-17 (Iowa 1995). The court also emphasized that Iowa's drug tax is not imposed upon property the taxpayer neither owns nor possesses. *Id.* at 117.

Likewise, the Kansas Supreme Court rejected a double jeopardy claim predicated on *Kurth Ranch*, noting that the Kansas tax is due immediately upon acquisition or possession of marijuana, regardless of arrest or criminal prosecution. *State v. Gulledge*, 896 P.2d 378, 385 (Kan. 1995). The Kansas tax is due upon acquisition of the drugs and is intended to be assessed when the taxpayer is in possession of the drug. *Id.* at 389.

Finally, the Alabama Court of Civil Appeals also distinguished *Kurth Ranch* and upheld the criminal conviction of a defendant who had been arrested for possession of marijuana and subjected to a final jeopardy assessment by the state department of revenue after failing to purchase and affix a drug tax stamp to the marijuana. *Milner v. State*, 658 So.2d 500 (Ala. Civ. App. 1994), *state cert. denied*, (Ala. Mar. 3, 1995). "In Alabama, the drug tax is levied on the possession of drugs, regardless of whether there is a criminal charge against the taxpayer." *Id.* at 502. "Alabama's tax is an excise tax on the dealer and not a property tax on confiscated goods." *Id.*

Contrary to these state decisions, the Indiana Supreme Court interpreted *Kurth Ranch* to mandate that Indiana's tax is a punishment under this Court's double jeopardy principles. Yet Indiana's CSET lacks the unusual features which rendered Montana's drug tax a punishment. Critical to this Court's decision in *Kurth Ranch* was that Montana imposed a property tax not due to be paid until *after* the taxpayer was arrested.

By contrast, Indiana's excise tax "is due when the person receives delivery of, takes possession of, or manufactures a controlled substance" in violation of state or federal drug statutes. IND. CODE § 6-7-3-8. App. A-44. In deciding that the CSET is a punishment under *Kurth Ranch*, the Indiana Supreme Court thus ignored the critical distinction that Indiana's is an excise tax due at the time of the taxed act, not a property tax the payment of which is due only upon arrest for the underlying criminal offense. *Id.* at 296-97. App. A-6 -10.[4]

[4] A drug tax is not invalid merely because it may discourage or deter the taxed activity. *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (upholding federal tax on marijuana of $100 per ounce as a "legitimate exercise of the taxing power"). Nor does conditioning a tax on the commission of a crime transform the tax into a punishment. It is

Unlike in Montana, Indiana's legislature specifically made liability for the tax *independent* of arrest or any other phase of a criminal proceeding. Consistent with its denomination as an excise tax, the CSET is due as soon as one of the specified acts is undertaken by the taxpayer. IND. CODE § 6-7-3-8. App. A-44. Moreover, Indiana's statute unequivocally states that payment of the tax provides no immunity from criminal prosecution. IND. CODE §§ 6-7-3-9 to -10. App. A-44 -45. And a payor of the tax in Indiana cannot be required to reveal his identity, so that information obtained during payment cannot be used to prosecute the taxpayer for any offense other than failure to pay the tax itself. IND. CODE §§ 6-7-3-8 to -9. App. A-44.

The Indiana Supreme Court considered the CSET a punishment under *Kurth Ranch* because it found the tax is routinely imposed only after the taxpayer's drugs have been confiscated.[5] *Bryant*, 660 N.E.2d at 297. App. A-8. Yet "[t]he taxpayer's voluntary choice to ignore his or her tax obligation should not be the determinative factor in evaluating whether [the] tax constitutes punishment in the double jeopardy context." *Covelli,* 668 A.2d at 706.

Indiana's legislature designed the CSET to operate as an excise tax. The failure to pay the tax does not, as a matter of constitutional law, transform it into a punishment. The purposeful separation of the tax from any criminal proceeding demonstrates that the tax was designed for

---

well-established that illegal activity may be validly taxed. *Marchetti v. United States*, 390 U.S. 39, 58 (1968). The government also may tax activities related to controlled substances. *Minor v. United States*, 396 U.S. 87 (1969); *see Sanchez,* 340 U.S. at 44.

[5] For an example of full payment of the CSET before inception of criminal prosecution, see *Coulbern v. State*, 655 N.E.2d 1254 (Ind.App. 1995).

legitimate taxation purposes and not as a substitute for criminal punishment.

By improperly equating the CSET with Montana's drug tax, the Indiana Supreme Court applied *Kurth Ranch* in a manner that conflicts with the decisions of other state courts. The resulting conflict on this compelling double jeopardy question warrants certiorari review. U.S. SUP. CT. R. 10(b).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

GEOFFREY SLAUGHTER*
DAVID ARTHUR
GEOFF DAVIS
Deputy Attorneys General

*Counsel of Record

Dated: March 1996

APPENDIX

TABLE OF CONTENTS OF APPENDIX

1. Indiana Supreme Court Decision, *Ross Bryant v. State*, December 27, 1995 ..... A-1

2. Constitutional Provisions A-42

3. Statutory Provisons A-42

IN THE

SUPREME COURT OF INDIANA

No. 27S04-9409-CR-865.

ROSS BRYANT,
Appellant (Defendant Below),

v.

STATE OF INDIANA,
Appellee (Plaintiff Below).

December 27, 1995.

SHEPARD, Chief Justice.

We confront several questions of first impression involving Indiana's new drug tax. The State imposed both civil and criminal sanctions on appellant Ross Bryant for his failure to pay the Indiana Controlled Substance Excise Tax (CSET).[1] He appealed the criminal penalty, claiming he was twice punished for the same offense. We hold that the civil and criminal penalties were each jeopardies, and that both cannot be imposed without violating the Double Jeopardy Clause of the United States Constitution.

I. Statement of Facts

In August 1992, Grant County Sheriff's deputies responded to an alarm at Bryant's home. Discovering an open door with fresh pry marks on it, they entered the

[1] Ind.Code Ann. §§ 6-7-3-1 to 6-7-3-17 (West Supp.1994).

dwelling and searched it. There was no one in the home, but police found over 250 marijuana plants in the basement, outhouse and garden. Officers then obtained a warrant and completed a more thorough search which uncovered marijuana seeds, dried marijuana and other drug paraphernalia. When police questioned Bryant upon his return, he confessed that the marijuana was his and that he was growing it for his own use. Police then arrested Bryant and transported him and the objects seized to the Grant County Jail.

The deputies next contacted the Indiana Department of Revenue to report their findings. The Department dispatched a special agent to the jail to determine the amount of Controlled Substance Excise Tax owed by Bryant.[2] The agent weighed the marijuana and assessed a tax of $83,680.[3] The agent then met with Bryant and demanded payment. Because Bryant did not immediately pay the CSET, the agent served him with a "Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand" which required payment of the CSET plus a 100 percent penalty for nonpayment of the tax.[4] Bryant's total

---

[2] Ind.Code Ann. §§ 6-7-3-8, 11 (West Supp.1994). The CSET, which went into effect on July 1, 1992, imposes a tax on the delivery, possession or manufacture of a ch. Controlled substance in Indiana in violation of Ind.Code ch. 35-48-4 or 21 U.S.C. §§ 841-852. Ind.Code Ann. § 6-7-3-5 (West Supp.1994).

[3] The marijuana seized from Bryant weighed 2092 grams. The CSET prescribes that schedule I, II, and III controlled substances (including marijuana) are taxed at a rate of $40 per gram and a proportionate amount for each fraction of a gram. Ind.Code Ann. § 6-7-3-6 (West Supp.1994). Schedule I, II and III substances are identified at Ind.Code Ann. §§ 35-48-2-4, -6, and -8 (West Supp.1994).

[4] Ind.Code Ann. § 6-7-3-11(a) (West Supp.1994) provides: "A person may not deliver, possess or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A

obligation to the State was thus $167,360. The very next day, the Department levied on Bryant's "checking and/or savings accounts, contents of safe deposit boxes, money market accounts, certificates of deposit, ... [and] any other evidence of indebtedness" as payment on this obligation. (R. 456.) Counsel informed us at oral argument that the Department also seized Bryant's home.

The State next charged Bryant with failure to pay the CSET, a class D felony;[5] growing and cultivating more than 30 grams of marijuana, a class D felony; [6] maintaining a common nuisance, a class D felony;[7] and, possession of less than 30 grams of marijuana, a class A misdemeanor.[8]

In April 1993, Bryant was convicted on all four counts. The court sentenced him to two and a half years in prison on each of the four felony counts and one year for misdemeanor possession. His sentences were to run concurrently, with one year suspended to probation.

---

person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax."

[5] Ind.Code Ann. § 6-7-3-11(b) (West Supp.1994) declares: "A person who knowingly or intentionally delivers, possesses, or manufactures a controlled substance without having paid the tax due commits a Class D felony. This subsection does not apply to a person in violation of IC 35-48-4-11, if the violation is a misdemeanor." (The second sentence of this subsection exempts first-time offenders involving no more than thirty grams of marijuana, or two grams of hash oil or hashish.)

[6] Ind.Code Ann. § 35-48-4-11(2) (West 1986).

[7] Ind.Code Ann. § 35-48-4-13 (West Supp.1994).

[8] Ind.Code Ann. § 35-48-4-11(1) (West 1986).

Bryant subsequently appealed to the Indiana Court of Appeals. After briefing was completed, I transferred the case to this Court pursuant to the authority granted me by Ind.Appellate Rule 4(D).

Bryant raises the following issues on appeal:

1. Whether the State violated the Double Jeopardy Clause by assessing both the CSET's civil and criminal sanctions against Bryant;[9]

2. Whether the trial court erroneously convicted Bryant for failure to pay the CSET based on evidence that he grew and cultivated marijuana;

3. Whether the trial court erred when it admitted evidence obtained in the search of Bryant's home;

4. Whether the trial court erred by admitting evidence of Bryant's prior convictions; and,

5. Whether there was sufficient evidence to convict Bryant of possessing marijuana and maintaining a common nuisance.

We hold the Department's assessment of the CSET against Bryant was a jeopardy. His criminal prosecution for failure to pay the CSET constituted a second jeopardy in violation of his double jeopardy rights under the United States Constitution as did his criminal prosecutions for growing and possession marijuana. Accordingly, we vacate

---

[9] Bryant also alleges that the CSET violates the federal and state prohibitions against excessive fines and the state prohibition against imprisonment for a debt. U.S. Const. amend. 8; Ind.Const. art. I, §§ 16, 22. Because we reverse Bryant's CSET conviction, we need not address these issues.

his conviction on that count.[10] We affirm his convictions on the three remaining counts.

II. The CSET and Double Jeopardy

Bryant claims that because the State assessed the CSET and its 100 percent penalty for nonpayment against him and later convicted him of a felony for nonpayment, it violated his double jeopardy rights under the United States and Indiana Constitutions.[11] U.S. CONST. AMEND. V; IND. CONST. art. I, § 14.[12]

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. This clause is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). It protects a person from suffering (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

Jeopardy is, in its constitutional sense, a technical term which has traditionally applied only to criminal

---

[10] Thus, we need not address the second claim listed above.

[11] Bryant characterizes the tax and civil penalty for nonpayment as one punishment or jeopardy. Accordingly, we consider these provisions in tandem.

[12] Article I, § 14 provides: "No person shall be put in jeopardy twice for the same offense." Bryant has presented no cogent argument with respect to his Indiana claim. He thus presents no viable state constitutional basis for his appeal. St. John v. State (1988), Ind., 523 N.E.2d 1353, 1355.

prosecutions. Evans v. Brown, 109 U.S. 180, 3 S.Ct. 83, 27 L.Ed. 898 (1883). Departing from this historical rule, however, the U.S. Supreme Court has held in recent years that particular forfeitures, civil fines and financial exactions can be "jeopardies." Montana Dep't of Revenue v. Kurth Ranch, --- U.S. ----, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). Cf. Austin v. United States, --- U.S. ----, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). In determining whether a jeopardy has occurred, the Court has said that the sanction's label of "criminal" or "civil" is not controlling. Halper, 490 U.S. at 447, 109 S.Ct. at 1901; see also United States v. Haywood, 864 F.Supp. 502, 506 (W.D.N.C.1994) (description of sanction as "civil" does not foreclose possibility it is a jeopardy). Rather, the test is whether the civil sanction constitutes a "punishment." Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1946. When the sanction serves the goals of punishment rather than the remedial purposes of compensating the government for its loss, it is a "punishment" and thus a "jeopardy" within the Double Jeopardy Clause. Id. The sanction's essence as a punishment can be identified "only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." Halper, 490 U.S. at 447, 109 S.Ct. at 1901.

A. Is the CSET's Civil Sanction a Punishment?

The Supreme Court recently delineated the analysis for determining whether a tax is a punishment in Kurth Ranch, --- U.S. ----, 114 S.Ct. 1937, a case bearing strong resemblance to the one before us. In Kurth, the Montana Department of Revenue sought to impose both criminal and tax penalties for the same possession of marijuana. In determining whether the tax was a "punishment" and thus a jeopardy under double jeopardy analysis, the Court

examined four factors: the tax's deterrent purpose (as opposed to revenue purpose), its high rate, its prerequisite of the commission of a crime before assessment, and the nature of the tax. Ultimately, the Court found that when considered in tandem these factors revealed that the Montana tax was a punishment and thus a second jeopardy imposed on the taxpayer in violation of the Double Jeopardy Clause.

To apply the Kurth analysis, we examine first the purpose and rate of the CSET.[13] It is apparent that the CSET is aimed at least partly towards deterrence. One who pays the CSET receives a receipt that admonishes him that delivery, sale, possession or manufacture of a controlled substance is a crime. Ind.Code Ann. § 6-7-3-10(a) (West Supp.1994). The taxpayer is required to show this receipt to officials to prove he has paid the tax, but the receipt is valid for only forty-eight hours. Ind.Code Ann. § 6-7-3-10(b) (West Supp.1994). A taxpayer who possesses the same drug for over forty-eight hours must therefore repay the tax every forty-eight hours to continue to possess a valid receipt and thereby avoid the CSET's additional sanctions. Both the receipt's admonition and the limited period for which it is valid suggest a deterrent purpose.

---

[13] Ind.Code Ann. § 6-7-3-13 (West Supp.1994) characterizes the initial assessment of the tax as a "jeopardy assessment." The Department claims the "jeopardy" label does not connote a "jeopardy" for double jeopardy purposes. Based on our conclusion that the CSET is a jeopardy, it is unnecessary to evaluate this delineation. Moreover, we will not address here whether the assessment of the tax itself was a jeopardy independent of the 100 percent penalty and criminal charge, as that issue was not raised on appeal. Rather, for today's purposes we consider the tax and civil penalty assessed by § 6-7-3-11(a) as one sanction.

Second, just as the Kurth Court found the high rate of the Montana tax demonstrated its punitive character, we find the CSET's rate similarly revealing. The Montana tax was imposed at the rate of $100 per ounce, roughly eight times the market value of the marijuana taxed. Kurth Ranch, --- U.S. at ----, n. 12, 114 S.Ct. at 1943, n. 12. Indiana's CSET imposes a tax of $40.00 per gram, or $1,133.96 per ounce. This is a rate of over ninety times the market value and more than eleven times the rate imposed in Kurth.[14] It indicates a punitive character.

The third factor the Kurth Court found suggestive of the tax's punitive nature was the fact that it was conditioned on the commission of a crime and was exacted only after the possessor was arrested. The Court found these conditions " 'significant of [the tax's] penal and prohibitory intent rather than the gathering of revenue.' " Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1947 (quoting United States v. Constantine, 296 U.S. 287, 295, 56 S.Ct. 223, 227, 80 L.Ed. 233 (1935)). The CSET is similarly conditioned on the commission of a crime. It is imposed only on individuals who deliver, possess or manufacture controlled substances "in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852." Ind.Code Ann. § 6-7-3-5 (West Supp.1994).

Moreover, while the plain language of the statute does not limit the imposition of the CSET to a time after arrest, this is its effect. The law does say that a taxpayer owes the tax regardless of whether she is arrested. The

[14] The Kurth Court identified the market value of marijuana as $200 per pound, which equals $12.50 per ounce or $.44 per gram. Kurth Ranch, --- U.S. at ----, n. 12, 114 S.Ct. at 1943, n. 12. We use this same market value to compare the rate of the CSET with the street value of Bryant's marijuana. There is no contrary evidence in the record.

Department assesses the tax, however, only when police contact it to report an individual who is in custody for the delivery, possession or manufacture of a controlled substance. The resemblance between the two schemes seems more compelling than the difference.

Finally, the Kurth Court found that because the Montana tax was characterized as a "property" tax but was assessed only after the controlled substance was confiscated, the tax possessed none of the indicia of "a species of a property tax." Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1948. Likewise, the CSET is so far removed from a normal excise tax that it must be classified as a punishment. An excise tax is one which is imposed upon the performance of an act or the enjoyment of a privilege. Black's Law Dictionary 506 (5th ed. 1979). As in Kurth, however, the Department routinely imposes the CSET only after a taxpayer's drugs have been confiscated. The taxpayer neither enjoys a privilege nor performs an act at the time of taxation. The CSET cannot therefore be classified as a normal excise tax. [15]

The CSET differs from a traditional excise tax in another respect. The rate of the tax so significantly outreaches that of other excise taxes in this state that its classification as a normal excise tax is impossible. No other Indiana excise tax imposes such a severe civil penalty for nonpayment. See, e.g., Ind.Code Ann. § 6-7-1-24(a)(2) (West Supp.1994) (failure to pay cigarette tax can result in fifty percent penalty).

---

[15] Unless the Department independently finds and assesses drug possessors without police intervention, this will always be the case. Evidence at trial suggested that the Department does not conduct such independent investigations and it did not do so in Bryant's case.

The CSET is not identical to the Kurth tax in every respect, but the factors outlined in Kurth do not create a bright line. After evaluating the CSET as a whole, like the Court in Kurth, we conclude that "this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1948. Accordingly, the assessment of the CSET and its 100 percent penalty against Bryant was a punishment and thus a jeopardy.

B. Were the CSET's Civil and Criminal Sanctions Multiple Punishments for the Same Offense?

Having concluded the CSET's civil sanction was a jeopardy, we must now determine whether the imposition of the CSET's civil and criminal penalties constituted multiple punishments for the same offense. Because the CSET imposes its civil and criminal penalties in two separate proceedings, we are not required to address the permissibility of "multiple punishments" imposed in the same proceeding. See, e.g., Kurth Ranch, --- U.S. at ----, n. 21, 114 S.Ct. at 1947, n. 21; cf. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076-77, 23 L.Ed.2d 656 (1969). Rather, we must address whether the CSET's criminal and civil punishments violate the double jeopardy prohibition against a second prosecution for the same offense after conviction or acquittal because it imposes separate sanctions in successive proceedings.[16]

[16] Even though the tax proceeding against Bryant began at the same time as the criminal prosecution, this does not make it a single proceeding raising the issue of "multiple punishments" for the "same offense." As in Kurth, the fact that the two were pending contemporaneously is not determinative. Kurth Ranch, --- U.S. at ----, n. 21, 114 S.Ct. at 1947, n. 21.

In determining whether the two offenses are the same, we apply the test first announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and recently revived in United States v. Dixon, --- U.S. ----, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).[17] Where the same act or transaction constitutes a violation of two distinct statutory provisions, "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. If each statute requires proof of an additional fact which the other does not," the offenses are not the "same offense" for double jeopardy purposes. Blockburger, 284 U.S. at 304, 52 S.Ct. at 182. For example, a state violates double jeopardy protection when it punishes a defendant for a greater offense and a "lesser included offense." That is, if the lesser included offense requires no proof beyond that required for the greater offense, the two are the "same offense" for purposes of the Double Jeopardy Clause.[18] There are, however, similar

[17] Five justices of the U.S. Supreme Court expanded the "same offense" analysis of Blockburger in the 1990 decision of Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). Grady established a second prong to the traditional Blockburger test under which courts were required to analyze whether the "conduct" underlying the offenses was the same, in which case a subsequent prosecution would be barred notwithstanding differences in the required elements. This decision was overruled by United States v. Dixon, --- U.S. ----, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), when the Court reestablished the primacy of the traditional Blockburger analysis.

[18] See, e.g., Brown v. Ohio, 432 U.S. 161, 167-68, 97 S.Ct. 2221, 2226-27, 53 L.Ed.2d 187 (1977), where the U.S. Supreme Court applied this "lesser included offense" analysis to the crimes of joyriding and auto theft. The Court concluded that a prosecutor who has established auto theft necessarily has established joyriding as well. Accordingly, they were the "same offense." The Court expanded this analysis in Harris v.Oklahoma, when it evaluated whether one offense was a species of a lesser-included offense of the other. Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977)

offenses which do not violate the "same elements" test. Crimes which possess overlapping proof are not conclusively double jeopardies. The conduct proved may be " 'one and the same' " so long as each offense possesses " 'an element not embraced in the other.' " Dixon, --- U.S. at ----, 113 S.Ct. at 2860 (quoting Gavieres v. United States, 220 U.S. 338, 345, 31 S.Ct. 421, 423, 55 L.Ed. 489 (1911)).

Employing the "same elements" analysis, we find that the CSET's civil and criminal sanctions are punishments for the same offense. Both punishments require that a person deliver, possess or manufacture a controlled substance without having paid the CSET to be subject to prosecution. The only distinction between the punishments is found in the criminal sanction imposed for nonpayment in subsection (b) of § 6-7-3-11. This provision requires a mens rea of "knowingly or intentionally" for criminal conviction. The CSET's civil sanction requires no mens rea. However, its elements are identical to the criminal sanction's elements in all other respects. Because the civil penalty invoked by subsection (a) of the statute requires no elements other than those included in the criminal penalty found in subsection (b), these subsections are two punishments for the same offense.

C. Which Jeopardy is Barred as the Second Jeopardy?

The determination of when jeopardy attaches is the lynchpin for concluding which jeopardy is barred as a second jeopardy. Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct. 2156, 2162, 57 L.Ed.2d 24 (1978). Consequently, we turn to the question of which CSET sanction was Bryant's first

---

(finding robbery a lesser-included offense when felony murder conviction required proof of robbery).

jeopardy and which was the second jeopardy prohibited by the Fifth Amendment. To resolve this question we must settle when jeopardy attaches in a civil proceeding. Of course, the U.S. Supreme Court has not considered this question since its decision just last year in Kurth. Thus, we write on largely a clean slate.[19] The Court has, however, enumerated factors and policies underlying attachment which will help identify the point when jeopardy attached in this action.

Although the Fifth Amendment declares that no person shall be twice put in jeopardy of life or limb, this constitutional prohibition is not against being twice punished, but is against twice being put in jeopardy. Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The Double Jeopardy Clause thus refers to the risk that a person will, for a second time, be convicted of the same offense. Id. The notion that "jeopardy" is "risk" is the very core of double jeopardy jurisprudence. Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). Where a risk of a determination of guilt exists, for example, jeopardy attaches. See, e.g., Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975); see also Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (jeopardy is the risk of trial and conviction, not punishment). These cases are consonant with the well-known rule that jeopardy attaches

---

[19] In fact, only a few courts have addressed when jeopardy attaches in a civil proceeding. See, e.g., United States v. Sanchez-Escareno, 950 F.2d 193, 201 (5th Cir.1991) (until government attempts to collect or does collect civil fines, mere imposition of fines does not constitute punishment for double jeopardy purposes); United States v. Park, 947 F.2d 130 (5th Cir.1991) (jeopardy attaches when forfeiture proceeding begins); United States v. Torres, 28 F.3d 1463 (7th Cir.1994) (holding jeopardy did not attach in drug forfeiture proceeding where defendant asserted no claim to seized drug money).

when a jury has been impaneled and sworn. United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

Using the point at which there is a risk of conviction as the moment when jeopardy attaches for Fifth Amendment purposes assures that a person is not forced to endure the personal strain, public embarrassment, and expense of a trial more than once for the same offense. The Double Jeopardy Clause achieves this result by effectively dictating that the government cannot make multiple attempts to convict an individual for an alleged offense, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Benton v. Maryland, 395 U.S. 784, 796, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707 (1969); see also Breed, 421 U.S. at 530, 95 S.Ct. at 1786. Accordingly, it is essential to determine the time of attachment to protect promptly the accused's rights to finality of judgment, to minimization of exposure to the ordeals of trial and to continue with a chosen jury. Crist, 437 U.S. at 38, 98 S.Ct. at 2162; see also United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (constitutional policy of finality inherent in Fifth Amendment). A court's conclusion that jeopardy attached at a specific point reflects its judgment that the constitutional policies underpinning the Double Jeopardy Clause are implicated at that stage of the proceeding. Jorn, 400 U.S. at 480, 91 S.Ct. at 554-55.

We conclude that jeopardy first attached when the Department served Bryant with its Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. At that moment, Bryant faced more than a risk of being found guilty; he had actually been found guilty. The assessment

itself was a judgment against Bryant for the CSET and its 100 percent nonpayment penalty. This judgment enabled the Department to levy on Bryant's property immediately, and the Department exercised that authority the day after it issued Bryant's jeopardy assessment. To hold jeopardy attached at any point later than assessment would give the Department latitude to subject the taxpayer to the ordeal of assessment and levy multiple times for the same offense.[20] That would be contrary to the constitutional policies underlying the Double Jeopardy Clause.

The dissent suggests that finding jeopardy attached at assessment forecloses prosecution. This is correct so long as the State prosecutes the defendant after the Department assesses the CSET. We know from oral argument on this cause, however, that the Department does not conduct independent investigations, searching for drug offenders. Rather, it learns of an offense only when contacted by the police or prosecutor. This situation creates the opportunity for discussion between the Department and law enforcement authorities as to who will proceed first. Moreover, it seems plain enough for Fifth Amendment purposes that, from the citizen's point of view, it is irrelevant whether penalties imposed by one branch of the government foreclose penalties by another branch.

---

[20] The only other options for attachment are the time of actual collection or when a taxpayer appeals the assessment. Attachment cannot be said to occur on appeal or at collection because the taxpayer is inherently at risk of a determination of guilt and of losing his property from the moment of assessment. Furthermore, if we were to find it attached when a taxpayer appeals the assessment, the defendant would possess the luxury of choosing which jeopardy was his first; he would initiate his appeal only where his tax liability was minor compared to his potential criminal penalty and would demand a speedy trial when his tax liability was significant compared to his potential criminal liability.

In any event, if there is any problem of coordination between the Department and law enforcement authorities (and what we were told at oral argument suggests there is none), the General Assembly may simply amend the statute to require the Department and prosecutor to consult with one another about who should go first.

The CSET assessment was Bryant's first jeopardy. The moment the jury was sworn in his criminal trial for nonpayment of the CSET a second jeopardy attached. Crist, 437 U.S. at 38, 98 S.Ct. at 2162. Accordingly, the Double Jeopardy Clause barred Bryant's criminal prosecution for nonpayment. We vacate the conviction for failure to pay the CSET.

Moreover, having concluded the CSET is a jeopardy, Bryant's convictions for growing more than 30 grams of marijuana and possessing less than 30 grams of marijuana were also subsequent jeopardies barred by the Double Jeopardy Clause. As we explain today in Clifft v. Indiana Dep't of State Revenue (1995), Ind., 660 N.E.2d 310, subsequent prosecutions under the criminal law for the same drug offenses twice places a defendant in jeopardy. We therefore vacate Bryant's criminal convictions.

III. The Warrantless Search of Bryant's Home

This case presents another novel issue unrelated to the CSET and double jeopardy. Bryant contends the trial court committed reversible error when it admitted evidence obtained in the police search of his home, saying it was illegally obtained in violation of the Fourth Amendment to the U.S. Constitution.[21] The State contends that exigent

[21] Police did not possess a warrant for the initial search of the home, but they obtained one before the second search, during which they seized the marijuana and drug effects. Bryant also contends that

circumstances justified the warrantless search because officers reasonably believed a person inside Bryant's home may have been in need of aid and because the deputies possessed probable cause to believe a burglary was in progress.

The Fourth Amendment provides each person the right to be secure in his or her person, houses, papers and effects against unreasonable searches and seizures. U.S. CONST. AMEND. 4.; IND. CONST. art. I, § 11. Generally, a search or seizure may only be conducted pursuant to a lawful warrant. Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); Taylor v. State (1992), Ind., 587 N.E.2d 1293. The cardinal principle in search and seizure jurisprudence therefore is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable ...--subject only to a few specifically established and well-delineated exceptions." Fair v. State (1993), Ind., 627 N.E.2d 427, 430 (quoting Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978)). Exigent circumstances compelling quick action before a warrant can be obtained are recognized as such an exception. Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) (building on fire). The State bears the burden of proving the existence of exigent circumstances sufficient to justify the lack of formalities. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

---

admission of this evidence violated Article I, § 11 of the Indiana Constitution, but does not present any cogent argument concerning this claim. Accordingly, the claim is waived. St. John, 523 N.E.2d at 1355.

The State initially argues that its warrantless search was justified because a person inside Bryant's home may have been in need of aid. The U.S. Supreme Court and this Court have recognized a limited exception to the warrant requirement where an officer reasonably believes such circumstances exist. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); Tata v. State (1986), Ind., 486 N.E.2d 1025. In cases employing this exception, however, police possessed objective evidence that a violent crime had or was about to occur. Hayden, 387 U.S. 294, 87 S.Ct. 1642; Tata, 486 N.E.2d at 1028. There was no such evidence in this case. Officers did not find any evidence outside the home and did not hear any sound from the home which could reasonably lead them to conclude a person inside was in need of aid.[22] The warrantless search of Bryant's home cannot be justified on these grounds.

Until today, this Court had not considered the State's second argument: that police may enter a home when they reasonably believe a burglary may be in progress or has recently been committed. Numerous state and federal courts, however, agree that these are exigent circumstances excusing warrantless entry. See, e.g., Reardon v. Wroan, 811 F.2d 1025 (7th Cir.1987); State ex rel. Zander v. District Court, 180 Mont. 548, 591 P.2d 656 (1979) (warrantless entry necessary to protect property and determine whether suspect was hiding inside where police believed burglary was in progress); United States v. Salava, 978 F.2d 320 (7th Cir.1992).

---

[22] When police arrived at Bryant's home, no one told them that a violent crime against a person had occurred or was imminent. Cf. Tata, 486 N.E.2d at 1028.

Our own Court of Appeals has also recognized this exception. B.P.O.E. # 576, Elks Club v. State (1980), Ind.App., 413 N.E.2d 660. These courts and other authorities generally agree that such an entry and search does not offend the Fourth Amendment because the emergency circumstances surrounding a potential burglary justify the action. See 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 6.6(b), at 706-707 (2d ed. 1987). We agree that police may enter private property to protect that property when they reasonably believe the premises have recently been or are being burglarized.

Of course, any search conducted because police reasonably believe a burglary is in progress or has just occurred is limited to areas in which an intruder could reasonably conceal himself. Officers may not use the situation as an excuse to conduct a general search for evidence. State v. Crabtree, 655 S.W.2d 173 (Tenn.Crim.App.1983). A search beyond the exigencies presented would violate the Fourth Amendment.

In Bryant's case, Grant County Sheriff's deputies entered the home after receiving an emergency call from a neighbor who reported that a home alarm was sounding. When deputies arrived at the scene, they observed fresh pry marks on an open door. They entered the house and conducted a protective sweep of the residence.

The totality of these circumstances reveals that exigent circumstances justified the search. The sounding alarm, fresh pry marks and open door led police to a reasonable belief that a burglary was in progress or had recently occurred. The officers searched no more area than was reasonably necessary, but still discovered hundreds of marijuana plants in plain view. Admission of

evidence found during the search was therefore not error.

IV. Admissibility of Bryant's Prior Convictions

During Bryant's trial, the State cross-examined him regarding his convictions for robbery and armed burglary thirty-five and forty years prior to his arrest. Bryant contends these convictions were too remote to be admissible.

The trial court has considerable latitude in admitting or rejecting evidence. Error in admitting evidence is not a basis for setting aside a conviction unless the erroneous admission was inconsistent with substantial justice or affects the substantial rights of the parties. Ind.Trial Rule 61; Fleener v. State (1995), Ind., 656 N.E.2d 1140.

Under our common law evidentiary rules,[23] a prior criminal conviction may be used for impeachment if it involved dishonesty or false statement or constituted what is commonly referred to as an "infamous crime" which would have rendered the witness incompetent to testify. Ashton v. Anderson (1972), 258 Ind. 51, 279 N.E.2d 210, 217. Bryant's convictions for robbery and burglary fall squarely within the Ashton "infamous crimes" which the trial court could rightfully admit for impeachment purposes. A question regarding the lapse of time between the conviction and the testimony to be impeached does not affect the admissibility of the conviction. Robinson v. State (1983), 446 N.E.2d 1287. Rather, the lapse of time from the

[23] We adopted the Indiana Rules of Evidence on January 1, 1994. Because Bryant's offense occurred in 1992, we will not evaluate his claim under Indiana Rule of Evidence 609 which bars the use of a prior conviction for impeachment purposes if the conviction is more than ten years old. Instead, we evaluate it under common law evidentiary principles.

defendant's prior conviction is a matter for the jury to weigh in assessing the weight of the evidence and the credibility of the witness. Id. The trial court properly admitted evidence of Bryant's prior convictions.

V. Sufficiency of the Evidence

We do not reweigh the evidence or judge the credibility of the witnesses when considering a sufficiency question on appeal. Alfaro v. State (1985), Ind., 478 N.E.2d 670. These are matters exclusively within the province of the jury. Rather, we consider the evidence most favorable to the verdict, along with any reasonable inferences therefrom, to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Moore v. State (1987), Ind., 515 N.E.2d 1099. We affirm if each element of the crime is supported by substantial evidence. Loyd v. State (1980), 272 Ind. 404, 398 N.E.2d 1260, cert. denied, 449 U.S. 881, 101 S.Ct. 231, 66 L.Ed.2d 105.

Bryant challenges his misdemeanor conviction for possession of marijuana, claiming he was not in exclusive possession of the property in which officers found two bags of dried marijuana and over 300 marijuana plants. We need not address this issue based on our conclusion that the conviction was a second jeopardy barred by the Double Jeopardy Clause. We note, nonetheless, that Bryant owned the home in which the marijuana was found and confessed to police that the marijuana was his. Various other drug paraphernalia found in Bryant's home compounded the evidence of his guilt. We conclude there was no evidence which could reasonably lead the court to believe someone other than Bryant possessed the drugs.[24] There was sufficient evidence to support Bryant's conviction.

[24] At trial, Bryant claimed a former girlfriend had access to the

Bryant also challenges his conviction for maintaining a common nuisance, contending the State failed to prove he committed a continuous or recurring violation sufficient to constitute the "maintenance" of a common nuisance. The Code required the State to prove Bryant knowingly or intentionally maintained a building that was used for unlawfully keeping, offering for sale, selling or delivering a controlled substance described in § 35-48-4-8.5 to convict him of maintaining a common nuisance. Ind.Code Ann. § 35-48-4-13(b)(2) (West Supp.1994). We have not previously addressed whether § 35-48-4-13 requires the State to prove continuous or recurring possession. We did conclude, however, that continuous or recurring possession was an element under a former statute on the grounds that the "maintains" or "maintaining" language of the act implicitly required proof of a continuing or recurring violation. Keeth v. State (1923), 193 Ind. 549, 550, 139 N.E. 589, 590.[25] Because § 35-48-4-13(b) contains this same language in its body and title, we hold the State must have proven Bryant's recurring or continuous violation.

At trial, the State presented evidence which proved Bryant possessed substantial amounts of marijuana, a complex growing system and a variety of drug paraphernalia employed to cultivate, preserve and use marijuana in his home. When coupled with Bryant's

---

home and that she could have been growing and using the marijuana. Based on the lack of substantive evidence of this use or possession, we find, as did the trial court, that this contention has no merit.

[25] The Indiana Court of Appeals reached the same conclusion under our current statute. Plowman v. State (1992), Ind.App., 604 N.E.2d 1219 (evidence of isolated or casual occurrence insufficient to sustain conviction for maintaining common nuisance).

confession that he was growing the marijuana for his own use, this evidence was sufficient to prove continuing possession of a common nuisance.

VI. Conclusion

For the foregoing reasons, we vacate Bryant's convictions for failure to pay the CSET, growing and cultivating marijuana and misdemeanor possession. We affirm his conviction for maintaining a common nuisance.

DICKSON and SELBY, JJ., concur.

DeBRULER, J., concurs and dissents with separate opinion to follow.

SULLIVAN, J., dissents with separate opinion.

SULLIVAN, Justice, dissenting.

In Department of Revenue of Montana v. Kurth Ranch, --- U.S. ----, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the United States Supreme Court held that a proceeding initiated by the state of Montana to collect a tax on the Kurth family's marijuana crop was prohibited by the Double Jeopardy Clause where the Kurths had already been convicted in criminal court for possession of those drugs. Today our court holds that the mere assessment of a similar tax by the Indiana Department of State Revenue prior to trial for a related drug possession or dealing offense cuts off the ability of county prosecutors to obtain drug convictions and courts to impose sentences. I believe the majority today extends the protection of the Double Jeopardy Clause further than the United States Supreme Court requires.[26]

I

While I do not agree in all the particulars, I do agree that the Indiana CSET bears enough resemblance to the Montana dangerous drug tax at issue in Kurth Ranch to implicate the Double Jeopardy Clause. While the courts of several other states have found their drug tax statutes sufficiently distinct from the Montana tax to withstand scrutiny under Kurth Ranch, e.g., State v. Gulledge, 257 Kan. 915, 896 P.2d 378 (1995); State v. Lange, 531 N.W.2d 108 (Iowa 1995); Milner v. State, 658 So.2d 500 (Ala.Civ.App.1994); I find the majority's analysis persuasive that the CSET has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause. Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1945. Accord, Stennett v. State, 905 S.W.2d 612 (Tex.Ct.App.1995).

II

Concluding that the Indiana CSET is sufficiently similar to the Montana dangerous drug tax to subject it to the constraints of the Double Jeopardy Clause does not mean, however, that this is the same case as Kurth Ranch. Indeed, this case is different from Kurth Ranch in at least one very important way--in Kurth Ranch, the taxpayer had first been convicted of the underlying drug offense and sought to avoid the subsequent imposition of the drug tax

---

[26] "[A]n increasingly popular tactic of those criminally charged with violating state and federal drug laws and correlatively subjected to forfeiture proceedings is to concede in the forfeiture proceedings at the earliest opportunity and, thereafter, seek to avoid criminal sanctions by moving to dismiss pending criminal charges on double jeopardy grounds." People v. Hellis, 211 Mich.App. 634, 536 N.W.2d 587, 592 (1995). The majority opinion goes further by proscribing criminal sanctions once drug tax administrative proceedings are initiated; the accused need not concede anything to avoid prosecution.

on double jeopardy grounds; here the taxpayer has first been assessed the drug tax and seeks to avoid punishment for the underlying drug offense on double jeopardy grounds.

The majority contends that the order in which the state seeks to impose the criminal and tax punishments makes no difference--that the tax can be either a first or a second punishment, but in either case it is considered punishment for double jeopardy purposes. There is certainly authority for this position.[27] But I think we should tread cautiously in this area. First, the Montana tax could be imposed only after a criminal conviction and the Kurth Ranch majority expressly noted that it was not faced with "the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." Kurth Ranch, --- U.S. at ----, n. 21, 114 S.Ct. at 1947 n. 21. Second, the Supreme Court seems to emphasize the sequence in Kurth Ranch, several times making explicit reference to the fact that the imposition of the tax followed the imposition of the criminal sanction.[28] Third, as Justice

---

[27] Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1958 (Scalia, J., dissenting); United States v. $405,089.23, 33 F.3d 1210 (9th Cir.1994), amended by order, 56 F.3d 41 (1995); United States v. Sanchez-Escareno, 950 F.2d 193, 203 (5th Cir.1991); F. Anthony Paganelli, "Constitutional Analysis of Indiana's Controlled Substance Excise Tax," 70 Ind.L.J. 1301, 1330 & n. 217 (1995). But see United States v. $405,089.23, 56 F.3d at 41 (opinion of Ryner, J., dissenting from denial of rehearing en banc, joined by six other judges); United States v. Newby, 11 F.3d 1143, 1145 (3d Cir.1993).

[28] The Supreme Court's emphasis on the tax punishment constituting the second punishment is seen in the following passages:

> This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments

DeBruler points out, the effect of holding that the tax can constitute a first punishment for double jeopardy purposes is to interdict a "power of the highest essential order," namely the power of the state to prosecute criminal behavior. In the absence of clear mandate from the Supreme Court, I think it highly inadvisable for us to hold that an administrative assessment of a tax can constitute a first punishment for double jeopardy purposes.[29]

---

for the same offense.

Kurth Ranch, --- U.S. at ----, 114 S.Ct. at 1941 (footnote omitted) (emphasis supplied).

> The third proceeding involved the assessment of the new tax on dangerous drugs.

Id. at ----, 114 S.Ct. at 1942 (emphasis supplied) (the first proceeding was the criminal prosecution and the second was a civil forfeiture action).

> This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead it is a second punishment within the contemplation of [the Double Jeopardy Clause] and therefore must be imposed during the first prosecution or not at all.

Id. at ----, 114 S.Ct. at 1948 (emphasis supplied). While I acknowledge that this last sentence lends support to the majority's view that the drug tax can constitute a first punishment, it did not in Kurth Ranch and, for the reasons discussed in the text of my dissent, I do not think it prudent to extend this principle in the absence of the Supreme Court explicitly so holding.

[29] Several alternatives are available. First, we could hold that the tax becomes a first punishment only when ordered by a court, i.e., only when the taxpayer has exercised his or her right to protest the assessment in court or the department of revenue has obtained judicial assistance in enforcing it. Second, we could hold that sentencing on the underlying criminal offense extinguishes any previously established CSET liability. Either of these approaches would be consistent with the outcome of Kurth Ranch and would not interfere with the power of our

III

The majority takes the position that Kurth Ranch requires that when a civil or administrative proceeding or sanction has the punitive characteristics that subject it to the constraints of the Double Jeopardy Clause, the established principles of Double Jeopardy jurisprudence apply regardless of whether the criminal prosecution and sentencing or the civil or administrative proceeding and sanction come first. Even if I agreed with the majority that Kurth Ranch prevents the state from prosecuting drug offenders if CSET has already been imposed--and I do not; see part II, supra--I can not agree with the way the majority seeks to implement this principle. The majority says that jeopardy attaches when the revenue department issues its assessment notice and demand. This cannot be right--the mere issuance of an administrative order cannot be sufficient to shut down completely the state's ability to prosecute drug offenders.

A

The Double Jeopardy Clause is violated by (i) a second prosecution for the same offense after acquittal or conviction (which I will refer to as "prosecution jeopardy"), or (ii) multiple punishments for the same offense (which I will refer to as "punishment jeopardy").[30]

prosecutors to seek to bring drug possessors and dealers to justice.

[30] In United States v. Dixon, --- U.S. ----, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), Justice Scalia, writing for the majority, takes issue with Justice Souter who, in dissent, distinguishes between what I refer to as prosecution jeopardy and punishment jeopardy. Justice Scalia writes that "there is no authority, except Grady [v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990)], for the proposition that [double jeopardy] has different meanings in the two contexts." Dixon, --- U.S. at ----, 113 S.Ct. at 2860. Dixon overruled Grady. However, the Scalia-Souter debate addressed substantive principles of double

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076-77, 23 L.Ed.2d 656 (1969). And the factual patterns in this and the other cases before the court today generally involve three types of state actions: (i) a criminal prosecution for a drug possession or dealing offense; (ii) a criminal prosecution for the failure to pay the CSET; and (iii) an administrative (non-criminal) action to collect CSET due. Prosecution jeopardy arises or attaches in the first two types of actions at the time the jury is sworn or, in an action tried to the bench, at the time the fact finder begins to take evidence. Crist v. Bretz, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160-61, 57 L.Ed.2d 24 (1978) (jury trial); Serfass v. United States, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975) (bench trial); Maddox v. State (1952), 230 Ind. 92, 98, 102 N.E.2d 225, 228 (jury trial); State v. Proctor (1984), Ind.App., 471 N.E.2d 707, 708 (bench trial). See generally Joseph G. Cook, 3 Constitutional Rights of the Accused 2d §§ 23:17-23:25 (1986 & Supp.1995). The cases are not so clear as to precisely when punishment jeopardy attaches but I have found no authority for holding that it attaches before an offender has commenced to serve a valid sentence. See generally United States v. DiFrancesco, 449 U.S. 117, 134, 101 S.Ct. 426, 435-36, 66 L.Ed.2d 328 (1980); Coleman v. State (1986), Ind., 490 N.E.2d 711, 715; Williams v. State (1986), Ind.App., 494 N.E.2d 1001, 1004, cert. denied 481 U.S. 1054, 107 S.Ct. 2191, 95 L.Ed.2d 846 (1987); Arthur W. Campbell, Law of Sentencing 2d §§ 8:14-8:17 (1991 & Supp.1994).

---

jeopardy law. I distinguish between prosecution jeopardy and punishment jeopardy only for what I think are obvious procedural differences in when jeopardy in respect of a prosecution attaches and when jeopardy in respect of punishment attaches.

But because the concept of administrative or civil sanctions in general, and a tax in particular, constituting jeopardy is so new to the law,[31] there is little guidance as to when prosecution jeopardy or punishment jeopardy attach in such context. Indeed, the majority's analysis on this point is quite abbreviated.[32] Yet if we are to hold that at the moment of attachment, the state is interdicted from pursuing a criminal prosecution, ascertaining that moment of attachment becomes a vital inquiry.

I think we start with the basic principles that the mere filing of charges or conduct of pre-trial proceedings are not enough to implicate prosecution jeopardy and that the mere pronouncement of sentence is not enough to implicate punishment jeopardy. As noted above, prosecution jeopardy does not attach, in a jury trial, until

[31] The United States Supreme Court held for the first time that civil fines, forfeiture, and financial exactions styled as a tax can be penalties for crime in 1989, 1993, and 1994, respectively. Montana Dep't of Rev. v. Kurth Ranch, --- U.S. ----, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (tax); Austin v. United States, --- U.S. ----, 113 S.Ct. 2801,125 L.Ed.2d 488 (1993) (forfeiture); United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) (civil fines).

[32] The majority's only analysis on this point is that, at the point the department of revenue served the taxpayer with an assessment notice and demand, "Bryant faced more than a risk of being found guilty; he had actually been found guilty." The majority offers no authority for this proposition and I reject it. It seems to me tantamount to saying that when a prosecutor files criminal charges, a criminal defendant has actually been found guilty. In both instances, the assessment and filing of charges merely represents the first step in a statutorily-prescribed regime. That the department is authorized to seize the taxpayer's property immediately does not change the analysis for me. I discuss this issue in greater detail in part III-C-2, infra. And to continue my analogy to criminal procedure, the state is also entitled to impose substantial infringements on the criminally accused's liberty and property following the filing of criminal charges.

the jury is sworn, and, in a bench trial, until the fact finder begins to take evidence. I would analogize the administrative procedure for enforcing the CSET to the criminal bench trial and would find the imposition of the CSET to constitute a prosecution jeopardy at the point, but not before, the taxpayer exercises his or her rights to appeal an assessment, a hearing has been convened, and the fact finder has begun to take testimony. Similarly, I would not find the imposition of the CSET to constitute a punishment jeopardy unless and until the taxpayer has begun to pay the assessment.[33]

B

Indiana Code § 6-7-3-13 (1993) provides that the Department of Revenue shall proceed to assess and collect CSET due under Ind.Code § 6-8.1-5-3 (1993). Under 45 Ind.Admin.Code § 15-5-8 (1992), the taxpayer may protest the assessment within a prescribed period of time and request a hearing. If a hearing is requested, the department is required to follow the hearing procedures specified in 45 Ind.Admin.Code § 15-5-3. In contrast to the majority which holds that prosecution jeopardy attaches at the time the department makes its initial assessment, I would hold that no attachment occurs until the hearing or alternative procedures contemplated by 45 Ind.Admin.Code § 15-5-3 are convened and the fact finder has begun to take evidence.

The recent Colorado case of People v. Litchfield, 902 P.2d 921 (Colo.Ct.App.1995), cert. granted (Colo. Sep. 11, 1995), takes a similar approach to what I propose. Subsequent to defendants' arrests but prior to trial, the

---

[33] I make this point because there will be cases where the taxpayer will not contest the assessment. See part III-C-1, infra.

Colorado revenue department assessed defendants with controlled substances taxes and penalties. Defendants objected to the assessment and requested an administrative hearing. At the time of trial, the department had taken no action on the objections. Defendants moved to dismiss the criminal charges on grounds that the tax assessment was punishment and the double jeopardy clauses prevented their being subjected to criminal punishment for the same conduct. Id. at 924. Although the majority today would grant such motions, the trial court in Litchfield found that jeopardy had not yet attached to the assessment because there had been "no final administrative determination of defendants' obligation to pay the tax and penalty." Id. The Colorado appellate court agreed. Assuming that the tax was punishment under Kurth Ranch, the court pointed out that:

> [T]here has been no hearing and thus no final determination of defendants' liability for the assessed tax. In addition, defendants have not paid any money to the state nor has the state taken any steps to collect the tax obligation allegedly owed.
>
> Accordingly, jeopardy has not yet attached and there has been no punishment by imposition of liability for the state tax. See U.S. v. Sanchez-Escareno 950 F.2d 193 (5th Cir.1991) cert. denied, 506 U.S. 841, 113 S.Ct. 123, 121 L.Ed.2d 78 (1992) (no jeopardy attaches to preclude the government from prosecuting defendants for drug importation offenses until defendants actually pay civil fines assessed against them or until the government sues to collect on

notes executed by defendants for payment of such fines).

> Because defendants had not been subjected to punishment by imposition of a civil penalty for their alleged possession of marijuana, the trial court did not err when it found that the criminal prosecution did not subject them to multiple punishment in violation of the double jeopardy clauses.

Id. at 925. Note that the Colorado court finds no jeopardy attaching at least until a final determination of liability is made,[34] an even broader construction of attachment than I propose. I think attachment at the time the fact finder begins to receive evidence is a slightly better approach because it more closely tracks its criminal procedure analog.[35]

---

[34] In fact, the Colorado court suggests that jeopardy might not attach until the defendants actually paid money to the state or the state had taken steps to collect the tax obligation. Litchfield, 902 P.2d at 924. Cf. Ragin v. United States, 893 F.Supp. 570, 574 (W.D. N.C.1995) (holding in forfeiture proceeding accompanying drug prosecution that "jeopardy attaches when the final judgment of forfeiture is entered, and not when the claim or answer is filed or the property seized.")

[35] Additional support for this approach is found in the following hypothetical offered by Judge Easterbrook in an influential administrative forfeiture case:

> Suppose the civil forfeiture gets to trial first. The United States will try to show that the money was used in an illegal drug transaction. At the beginning of the hearing, when evidence is first presented to the trier of fact in a proceeding seeking to impose a penalty for crime, jeopardy attaches.

United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.1994)

C

The assessment of CSET raises two additional issues. First, what are the double jeopardy implications, if any, if the CSET is not contested? And, second, what are the double jeopardy implications if the revenue department, proceeding as permitted under the statute and regulation, seizes, or levies on and sells, the taxpayer's property?

C-1

In cases where the taxpayer does not contest the assessment, I would find no prosecution jeopardy as nothing analogous to prosecution has occurred.[36] However, under Kurth Ranch, I believe that CSET's punitive characteristics that implicate the Double Jeopardy Clause would cause punishment jeopardy to attach at the point the taxpayer began to pay the tax. Perhaps the case best illustrating this situation is United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir.1991), cert. denied, 506 U.S. 841, 113 S.Ct. 123, 121 L.Ed.2d 78 (1992), cited by

---

(citations omitted).

[36] See United States v. Baird, 63 F.3d 1213 (3d Cir.1995), where defendant Baird contended that a drug prosecution subsequent to an uncontested administrative forfeiture proceeding arising from the same incident subjected him to double jeopardy, the court observed that "[w]ithout risk of a determination of guilt, jeopardy does not attach.... Because Baird failed to contest the forfeiture, ... Baird was not, and could not have been, placed at risk by that process." See also United States v. Morgan, 51 F.3d 1105 (2d Cir.1995), where defendant Morgan contended that a bank fraud prosecution subsequent to his settlement of civil proceedings brought by the United States Department of Treasury's Office of Thrift Supervision subjected him to double jeopardy, the court noted that "Morgan cannot claim prosecution for the same offense arising after an acquittal or conviction because the initial civil proceeding did not result in either." Contra, United States v. Ursery, 59 F.3d 568, 571 (6th Cir.1995).

the Colorado court in People v. Litchfield, supra. In Sanchez-Escareno, three individuals had been arrested and assessed large civil fines by United States Customs officials for possession and attempted importation of marijuana. Criminal indictments based on the same conduct followed. The defendants did not protest the civil fines but instead acknowledged them by executing promissory notes. However, the notes had not been paid nor had the government attempted to collect the notes. The district court dismissed the indictments, concluding that punishment jeopardy attached at the point the defendants executed the promissory notes. Sanchez- Escareno, 950 F.2d at 194-95.

The Fifth Circuit reversed, reasoning as follows:

> Here, the government has yet to subject the defendants to trial at all or to exact any form of punishment whatsoever. Defendants are presently in the same position as someone who has been charged in two criminal proceedings, but has not yet been tried or punished in either. If the defendants actually pay the civil fines, then any subsequent criminal prosecution would be double jeopardy. See Ex parte Lange, 18 Wall. 163, 85 U.S. 163, 21 Led. 872 (1873) (when defendant "fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone"). Likewise, if the government chooses to go forward with its prosecution of the defendants, jeopardy would attach when the jury is empaneled and sworn, as it would in any criminal case. See Serfass v. United States, 420 U.S. 377,388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d

265 (1975). Finally, if the government attempts to collect on the notes, jeopardy would attach when the court begins to hear evidence in that action. See id. But at this point, defendants' contentions under the Double Jeopardy Clause are misplaced. Sanchez-Escareno, 950 F.2d at 202-203.

C-2

Indiana statutes and regulations provide that if the CSET is not immediately paid, the department "may levy on and sell the person's property." Ind.Code § 6-8.1-5-3 (1993); 45 Ind.Admin.Code § 15-5-8. If the department exercises this option, does punishment jeopardy attach? In People v. Krizek, 271 Ill.App.3d 533, 207 Ill.Dec. 857, 648 N.E.2d 313 (1995), defendant appealed the trial court's denial of his motion to dismiss drug charges on grounds that the prior seizure of his home to commence civil forfeiture proceedings constituted punishment jeopardy. The Illinois court analyzed federal court decisions from Oregon and Illinois that concluded that the seizure of a defendant's property does not, by itself, constitute punishment for purposes of the double jeopardy clause:

> [A]lthough the seizure of real property under the Forfeiture Act marks the beginning of the civil forfeiture process, the actual seizure itself has limited legal significance. The act of seizure neither extinguishes the ownership rights of claimants to the property, nor does it vest title in the State. The respective ownership rights of the parties remain unaltered until such time as the trial court enters its final judgment. Until final judgment is entered, the claimant has the

> opportunity to retain his ownership rights in the property. Common sense dictates that it is the deprivation of ownership, not the deprivation of the unencumbered use of the property, that determines when punishment for double jeopardy purposes occurs. The State's seizure of defendant's property, therefore, does not constitute punishment for double jeopardy purposes (see [United States v.] Stanwood, 872 F.SUPP. [791,] 799 [(D.Or.1994)]; [United States v.] Messino, 871 F.SUPP. [1027,] 1032 [(N.D.Ill.1994)]), and the State's attempt to prosecute defendant under the Illinois Criminal Code does not contravene the double jeopardy clause.

Krizek, 271 Ill.App.3d at 538, 207 Ill.Dec. at 860, 648 N.E.2d at 316. I think this reasoning is sound and would find that the seizure of a taxpayer's property by the revenue department does not constitute punishment. However, the sale of that property is a more difficult question, one which should properly await a specific case in which the issue is argued.

C-3

Lest we become so consumed in thinking about drug taxes as punishment that we forget the general rule, it is worth recalling that the general rule is that a tax is not punishment and only becomes so when, "[t]aken as a whole," it is "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment." Kurth Ranch, --- U.S. at ---, 114 S.Ct. at 1948. I mention this in the context of the two preceding sections because it is altogether plausible to me that a

taxpayer may pay a portion of CSET assessed, or the revenue department may levy upon and sell an amount of property, which would merely reimburse the government for its actual costs arising from the taxpayer's criminal conduct. See id. at ----, 114 S.Ct. at 1945 (quoting United States v. Halper, 490 U.S. 435, 449-450, 109 S.Ct. 1892, 1902-03, 104 L.Ed.2d 487 (1989)). Such a payment or levy and sale would not be sufficient in my view to constitute punishment jeopardy. Only to the extent that the amount paid or levied upon and sold in excess of that deemed reasonably remedial should be considered to be punishment. Cf. United States v. Morgan, 51 F.3d 1105 (2d Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 171, 133 L.Ed.2d 112 (1995) (double jeopardy not implicated in Office of Thrift Supervision accompanying bank fraud prosecution where defendant did not make threshold showing that civil sanction was "overwhelmingly disproportionate to the government's damages and expenses"); Ragin v. United States, 893 F.Supp. 570 (double jeopardy not implicated in civil forfeiture proceeding accompanying drug prosecution where "the forfeiture was proportional to the damages caused by Ragin's conduct, and the forfeiture was essentially remedial").

D.

If the majority is right that administrative imposition of a tax which is a punishment for double jeopardy purposes can cut off the state's ability to prosecute and sentence, then I think at a minimum the notion that jeopardy attaches at the time of assessment should be abandoned. Rather, I think analogies to the criminal procedure and the newly emerging precedents in the area of civil fines, forfeitures, and taxes indicate the following: First, a first prosecution should not attach until the accused contests the

assessment and evidence is taken at an administrative hearing. At this point, the ability of the state to prosecute for the underlying criminal offense would be cut off. Second, if the accused does not contest the assessment such that no adjudicatory proceedings are commenced, there is no prosecution jeopardy and the state is free to proceed with criminal prosecution. Third, if the accused pays a portion of the assessment in a sufficient amount to constitute punishment,[37] punishment jeopardy attaches and the ability of the state to sentence for the underlying criminal offense would be cut off.

Conclusion

I agree with the majority that the Indiana CSET has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause. See part I, infra. But I find nothing in Kurth Ranch that compels us to prohibit the prosecution of alleged drug offenders merely because the revenue department asserts a CSET obligation on the part of the alleged offender first. See part II, infra.

Assuming the established principles of Double Jeopardy jurisprudence apply regardless of whether the criminal prosecution and sentencing or the imposition of CSET comes first, I would hold that (i) there is no prosecution jeopardy unless the taxpayer contests the assessment and a hearing is convened to adjudicate the protest, Litchfield, 902 P.2d at 925; prosecution jeopardy attaches when evidence is first presented to the trier of fact, Torres, 28 F.3d at 1465; and (ii) there is no punishment jeopardy unless the taxpayer pays at least a portion of the

[37] Or, arguably, such an amount of property is levied upon and sold, depriving the accused of his or her ownership thereof. See part III-C-2, supra.

tax, Sanchez-Escareno, 950 F.2d at 202. See part III, infra. Certainly, there is nothing in Kurth Ranch that is inconsistent with this approach. In that case, Montana's tax authorities assessed the dangerous drug tax and the taxpayers contested the assessments in administrative proceedings. Kurth Ranch, --- U.S. at ---- - ----, 114 S.Ct. at 1942-43. Thus more happened in Kurth Ranch than the mere initiation of a drug tax assessment proceedings the taxpayers actually contested the assessment in administrative proceedings.

Based on the foregoing analysis, I would affirm Bryant's convictions. No claim is made that Bryant contested the assessment such that an adjudication of liability was conducted. As such, no prosecution jeopardy attached and the state was free to prosecute him on the criminal charges. Nor is any claim made that Bryant voluntarily paid a sufficient amount of the tax to constitute punishment.[38] As such, no punishment jeopardy attached and the state was free to punish him on the criminal charges. I agree with the majority's analysis of the non-CSET issues in Bryant's appeal.

DeBRULER, Justice, concurring and dissenting.

In U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and Montana v. Kurth Ranch, --- U.S. ----, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the complaints had already been punished as a result of a prior criminal prosecution when the governments exercised their

[38] Bryant may be able to establish that the seizure of his property following assessment constituted a change in ownership such that he could argue punishment. That issue, left open in part III-C-2, supra, is not before us.

taxing and sanctioning authority. The Supreme Court ruled in both cases that the exercise of that authority could constitute a second punishment in violation of double jeopardy. Here, by contrast, the state exercised its taxing and sanctioning authority before appellant Bryant was placed in jeopardy in court. The manner in which that taxing and sanctioning authority was exercised by Indiana revenue agents was normal for processes followed where controlled and regulated substances are involved. In my view, case law does not command the conclusion that those processes constituted a first punishment under the Double Jeopardy Clause. I would therefore affirm all of appellant's convictions.

To be sure, the legal signposts do not all point in the same direction. The large amount of the controlled substance excise tax and the fact that the tax is upon an illegal activity do tend to support the conclusion that it is a first jeopardy punishment under the Double Jeopardy Clause. However, those factors are lessened in value since the tax promotes the legitimate tax purposes of deterring a socially undesirable activity and raising revenue from what we know can be a highly profitable, clandestine, commercial enterprise. While the tax looks radically high as applied to marijuana, it looks less radical when applied to other controlled substances such as LSD and the opium derivatives, which are lighter in weight and more expensive on the black market.

In prosecutions of unlawful possession of other highly regulated substances such as liquor and cigarettes, it is ordinary for the criminal prosecution for possession of untaxed liquor or cigarettes to be viewed only as a first jeopardy even though the tax with penalty was paid during the pendency of the criminal proceeding. See Ind.Code Ann. § 7.1-5-4-1 (West 1982); Ind.Code Ann. § 6-7-1-24

(West 1989). Such payment is a wise choice since it might persuade a prosecutor not to pursue a conviction, or might serve as a mitigator in the judicial determination of a proper sentence. Such payment is not regarded as a first jeopardy punishment.

Finally, an assessment issued from within the revenue department operates under the majority opinion to foreclose exercise of the police power expressed in the tax statute via the local prosecuting attorney. That power is of the highest essential order, and I am reluctant to embrace such a shift of it, except in the clearest of circumstances.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V provides, in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]

U.S. CONST. amend. XIV provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law[.]

STATUTORY PROVISIONS

Federal

28 U.S.C. § 1257 (West's Ann. 1993). **State courts; certiorari.** (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

6-7-3-1 (Burns Supp. 1995). **"Controlled substances" defined.** As used in this chapter, "controlled substance" has the meaning set forth in IC 35-48-1-9.

6-7-3-2 (Burns Supp. 1995). **"Delivery" defined.** As used in this chapter, "delivery" has the meaning set forth in IC 35-48-1-11.

6-7-3-3 (Burns Supp. 1995). **"Department" defined.** As used in this chapter, "department" refers to the department of state revenue.

6-7-3-4 (Burns Supp. 1995). **"Manufacture" defined.** As used in this chapter, "manufacture" has the meaning set forth in IC 35-48-1-18.

6-7-3-5 (Burns Supp.1995). **Imposition of tax**. The controlled substance excise tax is imposed on controlled substances that are: (1) Delivered; (2) Possessed; or (3) Manufactured; in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured or dispensed by a person registered under IC 35-48-3.

6-7-3-6 (Burns Supp.1995). **Amount of tax.** (a) The Amount of the controlled substance excise tax is determined by the weight of the controlled substance as follows: (1) On each gram of a schedule I, II, or III controlled substance, forty dollars ($40) for each gram and a proportionate amount for each fraction of a gram. (2) On each gram of a schedule IV controlled substance, twenty dollars ($30) for each gram and a proportionate amount for each fraction of a gram. (3) On each gram of a schedule V

controlled substance, ten dollars ($10) for each gram and a proportionate amount for each fraction of a gram. (b) A gram of a controlled substance is measured by the weight of the substance in possession whether pure, impure, or diluted. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste.

6-7-3-7 (Burns Supp.1995). **Duty to pay tax not relieved by delivery of controlled substance to law enforcement officer.** A person who delivers a controlled substance to a law enforcement officer is not relieved of the duty to pay taxes under this chapter.

6-7-3-8 (Burns Supp.1995). **When tax due.** The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. A person may not be required to reveal the person's identity at the time the tax is paid.

6-7-3-9 (Burns Supp.1995). **Criminal prosecution not precluded by payment of tax -- Use of confidential information.** The payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter.

6-7-3-10 (Burns Supp.1995). **Evidence of payment.** (a) The department shall issue evidence of payment of the tax to the person paying the tax. The evidence of payment must include a statement stating the following:

"THIS EVIDENCE OF PAYMENT DOES NOT LEGALIZE THE DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE, THE UNAUTHORIZED DELIVER, SALE POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE IS A CRIME.".

(b) The evidence of payment is valid for forty-eight (48) hours after the payment is received by the department. A person who receives delivery of, takes possession of, or manufactures a controlled substance must also have a valid evidence of payment in the person's possession.

6-7-3-11 (Burns Supp.1995). **Penalty for failure to pay tax.** (a) A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax. (b) A person who knowingly or intentionally delivers, possess, or manufactures a controlled substance without having paid the tax due commits a Class D. felony. This subsection does not apply to a person in violation of IC 35-48-4-11, if the violation is a Class A misdemeanor.

6-7-3-12 (Burns Supp.1995). **Rules for enforcement of chapter.** The department may adopt rules under IC 4-22-2 necessary to enforce this chapter, including rules relating to the refunding of taxes paid under this chapter.

6-7-3-13 (Burns Supp. 1995). **Jeopardy assessment.** An assessment for the tax due under this chapter is considered a jeopardy assessment. The department shall

demand immediate payment and take action to collect the tax due as provided by IC 6-8.1-5-3.

6-7-3-14 (Burns Supp.1995). **Lien.** All jeopardy assessments issued for nonpayment of tax shall be considered a secondary lien to the seizure and forfeiture provisions of IC 16-42-20, IC 34-4-30.1, IC 34-4-30.5, and any federal law.

6-7-3-15 (Burns Supp.1995). **Establishment and administration of controlled substance tax fund.** (a) The controlled substance tax fund is established to receive all the revenue collected by the department under this chapter. (b) The fund shall be administered by the treasurer of state. Any expenses incurred in administering the fund shall be paid from the fund. Any interest earned on money in the fund shall be credited to the fund. (c) Any revenue remaining in the fund at the end of a state fiscal year does not revert to the state general fund. (d) Money in the fund is annually appropriated to cover the department's administrative and enforcement expenses under this chapter and to make the distributions required by this chapter.

6-7-3-16 (Burns Supp.1995). **Awards for information.** (a) The department may award up to ten percent (10%) of the total amount, collected from an assessment under this chapter to any person who provides information leading to the collection of a tax liability imposed under this chapter. An award made under this subsection must be made before any other distributions under this section. (b) Whenever a law enforcement agency provides information leading to the collection of a tax liability imposed under this chapter, the department shall award thirty percent (30%) of the total amount collected from and assessment to the law enforcement agency that provided the information that resulted in the assessment.

The law enforcement agency shall use the money the agency receives under this chapter to conduct criminal investigations. A law enforcement agency may not receive an award under more than one (1) subsection. (c) The department shall award ten percent (10%) of the amount deposited in the fund during each month to the law enforcement training board to train law enforcement personnel. (d) The department may use twenty percent (20%) of the amount deposited in the fund during a state fiscal year to pay the costs of administration and enforcement of this chapter. (3) Awards may not be made under this chapter to the following: (1) A law enforcement officer, (2) An employee of the department, (3) An employee of the Internal Revenue Service, (4) An employee of the federal Drug Enforcement Agency. (f) All the money deposited in the fund that is not needed for awards or to cover the costs of administration under this chapter shall be transferred to the state drug free communities fund established under IC 5-2-10. (g) An award made under subsection (a) or (b) shall be made on the basis of collections from each individual assessment that resulted from information supplied to the department by a person or law enforcement agency. (h) Money shall be considered collected under this section only after all protest periods have expired or all appeals have been adjudicated.

6-7-3-17 (Burns Supp.1995). **Distributions and transfers from controlled substance tax fund.** (a) All distributions and transfers from the controlled substance tax fund shall be paid monthly by the fifteenth of the month following the month of collection. (b) The department shall certify to the auditor of state the amount to be distributed to each law enforcement agency that is entitled to receive an award under this section 16 [IC 6-7-3-16] of this chapter. The treasurer of state shall make the distributions upon warrants issued by the auditor of state.

* * *

6-8.1-5-1 (Burns Supp. 1995). **Proposed assessment -- Notice -- Hearing -- Letter of findindgs -- Demand for payment -- Appeals.** (a) If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

(b) If the person has a surety bond guaranteeing payment of the tax for which the proposed assessment is made, the department shall furnish a copy of the proposed assessment to the surety. The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

(c) The notice shall state that the person has sixty (60) days from the date the notice is mailed to pay the assessment or to file a written protest. If the person files a protest and requires a hearing on the protest, the department shall: (1) set the hearing at the department's earliest convenient time; and (2) notify the person by United States mail of the time, date, and location of the hearing.

(d) The department may hold the hearing at the location of its choice within Indiana if that location complies with IC 6-8.1-3-8.5.

(e) No later than sixty (60) days after conducting a hearing on a protest, or after making a decision on a protest when no hearing is requested, the department shall issue a letter of findings and shall send a copy of the letter through the United States mail to the person who filed the protest and to the person's surety, if the surety was notified of the proposed assessment under subsection (a). The department may continue the hearing until a later date if the taxpayer presents additional information at the hearing or the taxpayer requests an opportunity to present additional information after the hearing.

(f) A person that disagrees with a decision in a letter of finding may request a rehearing not more than thirty (30) days after the date on which the letter of finding is issued by the department. The department shall consider the request and may grant the rehearing if the department reasonably believes that a rehearing would be in the best interests of the taxpayer and the state.

(g) If a person disagrees with a decision in a letter of finding, the person may appeal the decision to the tax court. However, the tax court does not have jurisdiction to hear an appeal that is filed more than one hundred eighty (180) days after the date on which the letter of finding is issued by the department.

(h) The tax court shall hear an appeal under subsection (g) de novo and without a jury. The tax court may do the following: (1) Uphold or deny any part of the assessment that is appealed. (2) Assess the court costs in a manner that the court believes to be equitable. (3) Enjoin the collection of a listed tax under IC 33-3-5-11.

(i) The department shall demand payment, as provided in IC 6-8.1-8-2(a), of any part of the proposed tax assessment,

interest, and penalties that it finds owing because: (1) the person failed to properly respond within the sixty (60) day period; (2) the person requested a hearing but failed to appear at that hearing; or (3) after consideration of the evidence presented in the protest or hearing, the department finds that the person still owes tax.

(j) The department shall make the demand for payment in the manner provided in IC 6-8.1-8-2.

(k) Subsection (a) does not apply to a motor carrier fuel tax return.

* * *

35-48-1-9 (Burns 1994). **Controlled substance.** "Controlled substance" means a drug, substance, or immediate precursor in schedule I, II, III, IV or V under: (1) IC 35-48-2-4, IC 35-48-2-6, IC 35-48-2-8, IC 35-48-2-10, or IC 35-48-2-12, if IC 35-48-2-14 does not apply; or (2) A rule adopted by the board, if IC 35-48-2-14 applies.

* * *

35-48-1-11 (Burns 1994). **Delivery.** "Delivery" means: (1) An actual or constructive transfer from one (1) person to another of a controlled substance, whether or nother there is an agency relationship; or (2) The organizing or supervising or any activity described in subdivision (1).

* * *

35-48-1-18 (Burns 1994). **Manufacture.** "Manufacture" means: (1) the production, preparation,

propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. It does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance: (A) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or (B) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale; or (2) the organizing or supervising of an activity described in subdivision (1).

* * *

35-48-4-11 (Burns 1985). **Possession of marijuana, hash oil, or hashish.** A person who: (1) Knowingly or intentionally possess (pure or adulterated) marijuana, has oil, or hashish; (2) Knowingly or intentionally grows or cultivates marijuana; or (3) Knowing that marijuana is growing on his premises, fails to destroy the marijuana plants; commits possession of marijuana, hash oil, or hashish, a class A misdemeanor. However, the offense is a class D felony (i) if the amount involved is more than thirty (30) grams of marijuana or two (2) grams of hash oil or hashish, or (ii) if the person has a prior conviction of an offense involving marijuana, hash oil, or hashish.

* * *

35-48-4-13 (Burns Supp.1992). **Visiting or maintaining a common nuisance.** * * * * (b) A person who knowingly or intentionally maintains a building, structure, vehicle, or other place that is used: (1) By persons to unlawfully use controlled substances; or (2) For unlawfully: (A) Keeping; (B) Offering for sale; (C) Selling; (D) Delivering; or (E) Financing the delivery of; controlled substances, or items of drug paraphernalia as described in IC 35-48-4-8.5; commits maintaining a common nuisance, a Class D felony.

(2)

No. 95-1567

Supreme Court, U.S.
FILED
JUN 6 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF INDIANA,

Petitioner,

vs.

ROSS BRYANT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

PATRICK N. RYAN
Counsel of Record for Respondent
RYAN & RYAN
112 South Boots Street
Marion, Indiana 46952
(317) 664-4132

25 pp

LIST OF INTERESTED PARTIES

All parties to the proceeding in the Court below are named in the caption. Petitioner, State of Indiana, was the only Appellee in the Indiana Supreme Court and the only plaintiff in the state trial court.

Respondent, Ross Bryant, was the only Appellant in the Indiana Supreme Court and the only defendant in the state trial court.

TABLE OF CONTENTS

	Page
List of Interested Parties	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	2
Statement of the Case	2
A. Course of Proceedings and Disposition of the Case Below	3
B. Correction of Misstatements in the Petition	5
Reasons for Denying the Writ	5
I. The Petition is not justiciable	5
II. *Bryant* is in compliance with *Kurth Ranch*	7
III. The General's complaint is merely sequential, and not substantive	7
IV. Two jeopardies did attach	8
Conclusion	9

Contents

Page

Appendix A 1a

Appendix B 8a

TABLE OF CITATIONS

Cases Cited:

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) 9

Bailey v. Ind. Dep't. of State Rev., 660 N.E.2d 322 (Ind. 1995) 4

Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975) 9

Bryant v. State, 660 N.E. 2d 290 (Ind. 1995) in passim 1

Clifft v. Ind. Dep't. of State Rev., 660 N.E.2d 310 (Ind. 1995) 4

Covelli V. Commissioner of Revenue Services, 668 A.2d 699 (Comm. 1995) 8

Contents

Page

Cases Cited - Continued:

Grand Forks v. Grand Forks Herald, Inc. (1981 ND) 307 N.W.2d 572, 27 ALR 4th 667 6

Hall v. Ind. Dep't. of State Rev., 660 N.E.2d 319 (Ind. 1995) 4

Hayse v. Ind. Dep't. of State Rev., 660 N.E. 2d 325 (Ind. 1995) 5

Montana Dep't. of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994) 2,3, 6, 7

Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975)..... 9

Statutes Cited:

Indiana Code §6-7-3-1 2

Indiana Code §6-7-3-11(b) 2, 3

Indiana Code §35-48-4-11(1) 3

Indiana Code §35-48-4-11(2) 3

Indiana Code §35-48-4-13..... 3

Contents

Page

United States Constitution Cited:

U.S. Const. Amend. V 6

U.S. Const. Amend. XIV 6

State Constitution Cited:

Indiana Const. Art. I, Sec. 14 ..... 2, 6, 7, 8

Rule Cited:

Indiana Rules of Appellate Procedure

Appellate Rule 4(B) and (D) 4

Appellate Rule 11 10

No. 95-1567

In The

Supreme Court of the United States

October Term, 1995

STATE OF INDIANA,

Petitioner,

vs.

ROSS BRYANT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Supreme Court of Indiana. The Indiana Supreme Court opinion is reported at 660 N.E.2d 290.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to interpret the Indiana Constitution (Article I, Section 14, on double jeopardy) unless there was an infringement of rights guaranteed by the federal constitution. The Attorney General (General) only claims that there was an expansion of a defendant's rights. Therefore, this case is not justiciable.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari since the Indiana Supreme Court opinion was in compliance with *Montana Dep't. of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994)*, which is controlling, the Fifth Amendment of the Federal Constitution, and Article I, Sec. 14 of the Constitution of Indiana.

Indiana drug laws are as severe as any in the nation. Moreover, it enacted its Controlled Substance Excise Tax in Indiana Code §6-7-3-1 et seq. which contains astronomical monetary tax rates and penalties. This excise tax imposes 100% penalties and felony provisions for non-payment of the tax when due under Indiana Code §6-7-3-11(b). The *Bryant* court found that assessment of this tax was a penalty.[1]

---

[1] The Department has reported that it assessed more than $154.8 million in drug taxes in 1384 cases from the time the tax took effect in June 1992 until December 1995, but has collected only $969,545.25, or less than 1 percent of the assessment.

Bryant only differs from *Kurth Ranch* in that the Controlled Substance Excise Tax was assessed and levied upon before he was tried and convicted, which consequently made the criminal trial the second jeopardy. But it is consistent with *Kurth Ranch* since he was twice put in jeopardy for the same offense.

A. Course of Proceedings and Disposition of the Case Below.

Ross Bryant was arrested on August 17, 1992, for possession of marijuana accidentally found in his home by the Grant County Sheriff's Department and formally charged on August 20, 1992, with:

1. Possession of Marijuana, a Class D felony, Ind. Code §35-48-4-11(2);
2. Maintaining a Common Nuisance, a Class D felony, Ind. Code. §35-48-4-13;
3. Possession of Marijuana, a Class A Misdemeanor, Ind. Code §35-48-4-11-(1);

and

4. Possession of Marijuana Without Paying the Excise Tax, a Class D felony under Ind. Code §6-7-3-11(b).

After his arrest, a member of the Grant County Sheriff's Department contacted the Indiana Department of Revenue which assessed the tax on August 17,1992, for an amount of $83,680.00. In addition, he was assessed a 100% penalty for not paying the taxes on the date it was due. Jeopardy attached when Bryant was assessed the tax and the 100% penalty.

Bryant had never been suspected of any drug activity before. When he was arrested on August 17, 1992, he was removed from his house. He posted bond the next day but was not permitted to return to his home until January 12, 1993, because of the state's tax levy.

He was tried on April 19 and 20, 1993, and convicted of the four offenses. He was then sentenced to the Indiana Department of Corrections.

He appealed his convictions to the Indiana Court of Appeals pursuant to Appellate Rule 4(B), but the case was transferred to the Supreme Court pursuant to Appellate Rule 4(D) for the opinion. The Indiana Supreme Court delivered its opinion on December 27, 1995, and it is set out in *660 N.E.2d 290 (Ind. 1995)* followed by four consistent opinions in similar cases, namely: *Clifft v. Ind. Dep't. of State Rev., 660 N.E.2d 310; Hall v. Ind. Dep't. of State Rev., 660 N.E.2d 319; Bailey v. Ind. Dep't. of State*

rev., 660 N.E.2d 322; and Hayse v. Ind. Dep't. of State Rev., 660 N.E.2d 325.[2]

B. Correction of Misstatements in the Petition

The General stated in paragraph 2 of page 3 of her Petition that Respondent pursued none of his statutory administrative remedies. This is not true. The Department of Revenue issued its letter of finding dated August 2, 1993, reducing the tax and weight of the marijuana from 2092 grams to 358.5 grams because the Revenue agents weighed considerable foreign material with it. Appendix A.

Also, Respondent filed a petition before the Indiana Tax Court on August 24, 1993, Cause 49T10-9308-TA-67, which is still pending awaiting the ruling from this Court. Appendix B.

REASONS FOR DENYING THE WRIT

I.

The petition is not justiciable

The petition for the writ filed by the State of Indiana against Ross Bryant is not justiciable. In *Bryant*, the Supreme Court of Indiana found that Bryant's constitutional protection from double jeopardy was violated. The defendant relied on

---

[2] These four opinions were based on appeals from the Indiana Tax Court but *Bryant* was an appeal from his criminal convictions.

Montana Dep't. of Revenue v. Kurth Ranch,114 S.Ct. 1937 (1994), to support his double jeopardy claim. The Court borrowed the analysis from *Kurth Ranch*, supra, and held that Bryant's protection from double jeopardy was violated as guaranteed by the Fifth Amendment of the United States Constitution and Article I, Sec. 14 of the Indiana Constitution.

The General now contends that the Court misapplied the *Kurth Ranch* analysis and thereby extended the Fifth Amendment further than the holding in *Kurth Ranch*. Although Bryant disagrees with the General, her contention is irrelevant. Bryant not only relied on the Fifth Amendment of the United States Constitution, but on Art. I, Sec. 14 of the Indiana Constitution, which also protects an individual from being placed twice in jeopardy for the same offense.

It is within the power of a state supreme court to apply higher constitutional standards than are required of the states by the Federal constitution. *Grand Forks v. Grand Forks Herald, Inc.* (1981 ND) 307 N.W.2d 572, 27 ALR 4th 667. Even if this Court finds that the Indiana Supreme Court erroneously extended Bryant's Fifth Amendment protection from double jeopardy, the decision must stand. *Bryant* was not only decided upon by the Fifth Amendment of the Federal Constitution, but upon Art. I. Sec. 14 of the State Constitution. And since it was decided upon by State constitutional principles, deference

must be given to a State Supreme Court while interpreting its own constitution if it chooses to apply higher constitutional standards. *Grand Forks*, supra.

II.

Compliance with *Kurth Ranch*

The decision of the Indiana Supreme Court is in full compliance with the opinion of this Court in *Kurth Ranch*. In fact, this Court recently denied certiorari in *Hall v. Indiana Dep't. of Revenue, 95-1589*, which was handed down by the Indiana Supreme Court as a companion case to *Bryant*.

The General waived a response, but filed her own Petition for a Writ of Certiorari seeking an inconsistent opinion herein.

III.

The General's objection of assessment is merely sequential not substantive

The General doesn't approve of the courts determination that the time of assessment is the proper time for a jeopary to attach.

The only difference between *Kurth Ranch* and *Bryant* is sequential, rather than substantive. In *Bryant*, the State elected to assess a tax on the day of his arrest, and removed him from his home for over four months by a tax levy. The State then proceeded

with a criminal trial eight months later. That was the State's choice. In *Kurth Ranch*, the defendants pleaded guilty first and the State sought the tax later. Therefore, the tax assessment was the second jeopardy; whereas in Bryant's case, the criminal penalty was the second jeopardy.

Other state courts and federal appellate courts are not bound by the Bryant ruling. The federal court decisions cited by the General all related to forfeitures, not drug taxes. The General simply wants this Court to overrule *Kurth Ranch* even though the *Bryant* opinion was also based on the Indiana Constitution, Art. I, Sec. 14 (Double Jeopardy clause).

Petitioner alleged that several other state and federal appellate courts are in conflict with *Kurth Ranch*. If that is the case, those courts should also comply with *Kurth Ranch*. For example, Connecticut distinguished its drug tax to avoid the *Kurth Ranch* decision. *Covelli v. Com'r. of Revenue Services, 668 A.2d 699 (Conn. 1995)*. The Indiana drug tax was found to be similar to the Montana tax which also was found to be a jeopardy.

IV.

Two jeopardies did attach

The General also laments that two jeopardies never attached in *Bryant*. She argues that merely being assessed a drug tax is too premature to constitute being a penalty, and that jeopardy did not

attach since Bryant never paid the tax. The General apparently fails to grasp the concept of double jeopardy. As relied on in *Bryant*, double jeopardy is not about being punished twice for the same offense, but twice being put in jeopardy for the same offense. *Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).* The notion that jeopardy is the risk of being punished, is the very core of double jeopardy jurisprudence. *Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).* Where risk of determination of guilt exists, jeopardy attaches. *Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).*

What the General fails to mention, is that not only was Bryant subjected to a jeopardy because of the risk of determination of guilt by the Department of Revenue, but that Bryant was found guilty when he was served a Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. This judgment enabled the Department to levy on Bryant's property. If jeopardy attached any time other than assessment, the Department could levy several times for the same offense. Therefore, Bryant not paying the tax is irrelevant since jeopardy attached at the time of the assessment.

CONCLUSION

The decision of the Indiana Supreme Court does not threaten or interfere with drug prosecutions as alleged by the General. Defendants in pending criminal prosecutions have already been punished

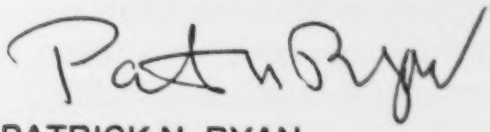
once. *Kurth Ranch* merely explained another facet of double jeopardy, and advised the judiciary that it shall not subject individuals to jeopardy twice for the same offense.

Indiana can resolve its concern by amending the Controlled Substance Excise Tax to a workable tax, increasing the criminal penalty for drug offenses, or merely allowing the Indiana Dep't. of Revenue and law enforcement authorities to decide who should act first.

The General did not brief these concerns for the Supreme Court of Indiana, nor did she file a petition for rehearing outlining these concerns which she is permitted to do under AR 11.

The writ of certiorari should be denied.

Respectfully submitted,



PATRICK N. RYAN
Counsel of Record for Respondent
RYAN & RYAN
112 South Boots Street
Marion, Indiana 46952
(317) 664-4132

APPENDIX A -- LETTER OF FINDING CONTROLLED SUBSTANCE EXCISE TAX FOR TAX YEAR 1992 FROM THE STATE OF INDIANA DEPARTMENT OF REVENUE ISSUED AUGUST 2, 1993

STATE OF INDIANA
DEPARTMENT OF REVENUE
LEGAL DIVISION
INDIANA GOVERNMENT CENTER NORTH
100 N. SENATE AVE., ROOM N248
INDIANAPOLIS, 46204-2253

28920748.LOF

LETTER OF FINDING

CONTROLLED SUBSTANCE EXCISE TAX

FOR TAX YEAR 1992

TAXPAYER: ROSS BRYANT
2118 S. PENN ST.
MUNCIE, INDIANA 47302

NUMBER: 92-0748
ISSUED: AUGUST 2, 1993

A telephone conference administrative hearing was held on June 15, 1993 at 10:00 a.m. Eastern Standard Time to hear the protest of Ross Bryant (hereinafter taxpayer) to a controlled substance excise tax assessment. The taxpayer was

represented by attorney Patrick N. Ryan. The hearing officer was R. Scott Partenheimer, Attorney.

ISSUES

I. Controlled Substance Excise Tax - Possession

Authority: IC 6-7-3

The taxpayer protests the Department's determination that he possessed the controlled substance upon which the assessment was based.

II. Controlled Substance Excise Tax - Weight

The taxpayer protests the weight measurement of the controlled substance.

STATEMENT OF FACTS

On August 17, 1992 Agent Rick Albrecht of the Indiana Department of Revenue Criminal Investigation Division assisted Grant County Police during a search of the residence owned by Ross Bryant. The search produced approximately 130 marijuana plants.

The marijuana was taken to the Grant County Sheriff's Department where it was weighed by Agent Albrecht. The total weight was 2,092 grams.

Appendix A

On the same day, Agent Albrecht delivered to the taxpayer a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand. The assessment was based on the taxpayer's failure to pay the controlled substance excise tax on the marijuana found in his possession.

On April 20, 1993 the taxpayer was convicted of: (1) possession of marijuana, a class D felony, (2) maintaining a common nuisance a class D felony, (3) possession of marijuana, a class A misdemeanor, and (4) failure to pay the controlled substance excise tax, a class D felony.

I. Controlled Substance Excise Tax - Possession

DISCUSSION

The taxpayer protests the Department's determination that he possessed the controlled substance upon which the assessment was based. In support of this claim, taxpayer asserts that the agents of the State of Indiana illegally entered and search his home and "presumably placed any drugs which may have been found on the premises."

IC 6-8.1-5-1 provides that notice of a proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests on the person against whom the proposed assessment is made. The taxpayer has not

provided any evidence to support his assertion. Furthermore, the taxpayer was found guilty in the Grant County Circuit Court of possession of the marijuana on which the assessment was based.

FINDING

The taxpayer's protest is denied.

II. Controlled Substance Excise Tax - Weight

DISCUSSION

The taxpayer protests the weight measurement of the controlled substance. The taxpayer asserts that the assessment should be based on a weight of 358.5 grams rather than 2092 grams. In support of this assertion taxpayer submitted an Indiana State Police "Report of Laboratory Examination" which states that the marijuana had a net weight of 358.5 grams. Taxpayer explained that the discrepancy exists because the Revenue agent weighed the stalks and stems of the marijuana plants while the state police weighed only the leafy substance.

IC 35-48-1-1 defines marijuana:

> "Marijuana" means any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and

> has oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom); or the sterilized seed of the plant which is incapable of germination. (emphasis added).

Since the stalks of the marijuana plant are specifically excluded from the definition of marijuana, the stalks are not subject to Indiana's Controlled Substance Excise Tax.

FINDING

Taxpayer's protest is sustained. The Criminal Division is directed to adjust the assessment to reflect a weight of 358.5 grams rather than 2092 grams.

REQUEST FOR REHEARING

Under 45 IAC 15-5-5, the taxpayer has the right to request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Letter of Findings.

Appendix A

A request for rehearing should be made within thirty days from the issue date of the taxpayer's Letter of Findings and should be sent to the Protest Review Board, Indiana Department of Revenue, Legal Division, Tax Appeals Section, P. O. Box 1104, Indianapolis, Indiana, 46206-1104. Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing. The Department will then notify the taxpayer in writing whether or not a hearing has been granted. In the event a rehearing is granted, the taxpayer will be contacted to set a rehearing date.

If the request for rehearing is denied, the taxpayer may pay the assessment and file a Claim for Refund with the Protest Review Board at the above address. A copy of the Letter of Findings should be attached to the Claim for Refund. If the Claim for Refund is denied, all administrative remedies will be exhausted and the taxpayer's only recourse is to file an appeal with the Indiana Tax Court pursuant to IC 6-8.1-9-1(c). Alternatively, the taxpayer may appeal the decision of the Letter of Findings with the Indiana Tax Court.

INDIANA DEPARTMENT OF REVENUE
Legal Division

s/ R. Scott Partenheimer
Attorney

Appendix A

s/ Teresa L. Modlin
Supervisor of Tax Appeals

s/ Robert Robinson
Administrator

APPENDIX B -- ORDER OF THE INDIANA TAX COURT FILED MARCH 27, 1996

IN THE
INDIANA TAX COURT
Case No. 49T10-9308-TA-00067

TITLE OF CASE: ROSS BRYANT, Petitioner v. INDIANA DEPARTMENT OF STATE REVENUE, Respondent

Brief Statement of Order

The Court is advised that the Office of the Indiana Attorney General is filing a petition of certiorari to the Supreme Court of the United States in a related case. The related case and further proceedings in this case should be stayed pending action by the Supreme Court of the United States on said petition for certiorari. Accordingly, the proceedings are stayed and the parties are ordered to file status reports on November 1, 1996 or sooner if the Supreme Court of the United States should act on said petition for certiorari.

SO ORDERED this 27 day of March, 1996.

s/ Thomas G. Fisher
Judge, Indiana Tax Court

Appendix B

Distribution:

Patrick N. Ryan
RYAN & PAYNE
112 South Boots Street
Marion, IN 46952

Pamela Carter
Attorney General of Indiana
By: David A. Arthur
Deputy Attorney General
Indiana Government Center South, Fifth Floor
402 West Washington Street
Indianapolis, IN 46204-2770

FILED
JUN 13 1996
CLERK

(3)

No. 95-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF INDIANA,
Petitioner,
v.
ROSS BRYANT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

---

REPLY TO BRIEF IN OPPOSITION

PAMELA CARTER
Attorney General of Indiana

GEOFFREY SLAUGHTER*
DAVID ARTHUR
GEOFF DAVIS
Deputy Attorneys General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6255

*Counsel of Record

6 pp

No. 95-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF INDIANA,
Petitioner,
v.
ROSS BRYANT,
Respondent.

REPLY TO BRIEF IN OPPOSITION

The plain text of the decision below shows that Respondent is wrong to claim it was based on the Indiana Constitution. (Opp. Cert. 2, 5-7.) The Indiana Supreme Court based its holding exclusively on the Double Jeopardy Clause of the federal Constitution and expressly rejected a state law claim: "[Respondent] has presented no cogent argument with respect to his Indiana claim. He thus presents no viable state constitutional basis for his appeal." (Cert. Pet. A-5 n.12) (citation omitted).

By his silence, Respondent implicitly concedes that no other state or federal court has extended the reach of the Double Jeopardy Clause as far as the Indiana Supreme Court's holding that jeopardy attaches upon the mere administrative assessment of the state's drug excise tax. The decision below thus adds to the confusion among lower courts about the way double jeopardy principles apply to taxes and civil sanctions that are imposed in connection with

illegal drugs.[1] The conflict on this compelling double jeopardy question warrants this Court's certiorari review. SUP. CT. R. 10(b).

Petitioner apologizes for its obvious misstatement that "Respondent pursued none of [his] administrative remedies." (Cert. Pet. 3). In fact, Respondent administratively challenged the amount of the assessed tax, arguing both that he never possessed the seized marijuana, and that the weight measurement was error. The state department of revenue rejected his possession claim but

---

[1] For conflicting state cases, see *Desimone v. State*, 904 P.2d 1 (Nev. 1995) (jeopardy attaches when assessed tax liability has been reduced to judicial judgment), *petition for cert. filed*, 64 U.S.L.W. 3469 (Jan. 2, 1996) (No. 95-1058); and *State v. Litchfield*, 902 P.2d 921 (Colo. App. 1995) (jeopardy attaches when there has been final administrative determination of tax liability), *aff'd on other grounds*, ___ P.2d ___ (Colo. Jun. 3, 1996) (No. 95SC331).

For conflicting federal cases, see *United States v. Idowu*, 74 F.3d 387, 396 (2d Cir. 1996) (suggesting jeopardy attaches no earlier than when trier of fact begins to hear evidence at judicial forfeiture proceeding or when there is order for final administrative action against defendant's property), *cert. denied*, 116 S. Ct. ___ (U.S. Jun. 3, 1996) (No. 95-8843); *United States v. McDermott*, 64 F.3d 1448, 1455 (10th Cir. 1995) ("Nor do we consider the mere filing of an administrative claim sufficient to trigger jeopardy, at least where that act converts the proceeding to a judicial one with an opportunity for hearing."), *cert. denied*, 116 S. Ct. 930 (1996); *United States v. Baird*, 63 F.3d 1213, 1218 (3rd Cir. 1995) (jeopardy attaches when defendant is "put to trial before a trier of facts"), *cert. denied*, 116 S. Ct. 909 (1996); *United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995) ("Jeopardy attaches in a nontrial forfeiture proceeding when the court . . . enters the judgment of forfeiture"), *cert. granted*, 116 S. Ct. 762 (1996); *United States v. Barton*, 46 F.3d 51, 52 (9th Cir. 1995) (suggesting jeopardy might attach as soon as defendant "file[s] his answer to the forfeiture complaint"); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.) (jeopardy attaches "when the case is first presented to the trier of fact"), *cert. denied*, 115 S.Ct. 669 (1994); and *United States v. Park*, 947 F.2d 130, 135 (5th Cir. 1991) (no jeopardy until adjudication or final administrative action), *vacated in part on other grounds on rehearing in part*, 951 F.2d 634 (5th Cir. 1992).

agreed that his tax liability should have been based on 358.5 grams of marijuana, not 2092 grams. The revenue agent had improperly included the weight of the marijuana plants' "stalks and stems" instead of just the "leafy substance." (Opp. Cert. 4a.) Respondent's case is now before the Indiana Tax Court, which stayed further proceedings pending this Court's disposition of the petition for certiorari. (Opp. Cert. 8a.)

The fact that an administrative case is pending does not affect the "cert-worthiness" of this petition. Regardless of the outcome of the administrative proceeding, Respondent's subsequent criminal prosecution is barred as a second jeopardy, under the reasoning of the decision below, because the assessment itself was determined to be a first jeopardy on the purported authority of this Court's double jeopardy jurisprudence.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

GEOFFREY SLAUGHTER*
DAVID ARTHUR
GEOFF DAVIS
Deputy Attorneys General

*Counsel of Record

Dated: June 1996